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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Evera S.A. Commercial *v.* North Shipping Co. Ltd.	[1956] 2 Lloyd's Rep. 367		121
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Graham *v.* C. E. Heinke & Co. Ltd.	[1958] 1 Q.B. 432; [1958] 2 W.L.R. 224; [1958] 1 All E.R. 365		87
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Hammerton & Co. *v.* Dysart (Earl)	[1916] 1 A.C. 57; 31 T.L.R. 592		26
Hammond *v.* Hammond	[1957] P. 349; [1957] 3 W.L.R. 395; [1957] 3 All E.R. 16	*N.F.*	97, 99, 102–105
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1839

Metropolitan Police Act, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54 (13) - - - **Divl.Ct. 212**

1840

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1861

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1870

Extradition Act, 1870 (33 *&* 34 *Vict. c.* 52), *ss.* 10, 26 - - - **Divl.Ct. 498**

1871

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1898

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1907

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1913

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1915

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1916

Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (1) - - - - - **Divl.Ct. 244**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3) - - **C.A. 37**

1930

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*a*) - - - - **Divl.Ct. 258**

—— —— *s.* 21 (*c*) - - - **Divl.Ct. 294**

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—— —— *s.* 151 (1) (6) (9) **Lord Parker C.J. 265**

1946

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National Insurance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 1 (2) (*a*) (*c*) - **Salmon J. 519**

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Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 2 (1), 3 (1), 23 **C.A. 384**

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—— —— *ss.* 2 (2) (*e*), 4 (3) - - **C.A. 86**

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1952

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1953

Valuation for Rating Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 42), *s.* 3 (2) - - - **C.A. 413**

Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 48 (4) (5) - - - - **C.A. 167**

1954

Housing Repairs and Rents Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 41 - - **C.A. 37**

1957

Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2 (1) - - - - - **C.C.A. 396**

1959

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STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Treaty of 1876 *between England and France* [*Order in Council dated May* 16, 1878], *art. VII* (*c*) - **Divl.Ct. 498**

County Court Rules, 1936 (*as amended*), *Ord.* 43, *rr.* 3 (2), 8 - - **Divl.Ct. 133**

Prison Rules, 1949 (*S.R. & O.*, 1949, *No.* 1073), *rr.* 42 (13), 44 [*as amended*] **C.C.A. 513**

Legal Aid (*General*) *Regulations*, 1950 (*S.I.* 1950, *No.* 1359) (*as amended*), *reg.* 18 (3) (*b*) - - - **McNair J. 97**

National Insurance (*Industrial Injuries*) (*Increase of Benefit and Miscellaneous Provisions*) *Regulations*, 1957 (*S.I.* 1957, *No.* 2074), *Sch. I*, *Pt. II* **C.A. 467**

R.S.C., *Ord.* 22, *r.* 6 - - - **C.A. 467**

R.S.C., *Ord.* 36A, *rr.* 2, 7, 9 - **C.A. 201**

R.S.C., *Ord.* 55B - - - **Salmon J. 519**

R.S.C., *Ord.* 65, *r.* 27 (41) - **McNair J. 97**

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

BIRTLEY AND DISTRICT CO-OPERATIVE SOCIETY LTD. *v.* WINDY NOOK AND DISTRICT INDUSTRIAL CO-OPERATIVE SOCIETY LTD. (NO. 2).

1958

Nov. 3, 4, 5, 6, 10; *Dec.* 16.

Streatfeild J.

[1957 B. No. 1416.]

Industrial and Provident Societies—Contract—Arbitration rule—Construction—Submission to arbitration by member of society—Membership terminated before final award—Whether award binding after cessation of membership.

Arbitration—Award—Illegality—Restraint of trade—Award ex facie lawful—Whether court entitled to look behind award.

Restraint of Trade—Arbitration award—Co-operative trading societies—Restriction on trading activities of one society—Whether unreasonable restraint of trade.

Trade Union—Meaning—Co-operative trading—Union consisting of co-operative societies—Whether union a trade union—Trade Union Act, 1871 (34 *&* 35 *Vict. c.* 31), *s.* 4.

The plaintiffs and the defendants were both co-operative trading societies and members of the Co-operative Union Ltd., all of whom were registered under the Industrial and Provident Societies Act, 1893, by section 22 of which the rules of a registered society bound the society and all its members as if each had covenanted to conform thereto. By rule 2 of the rules of the union the objects of the union were to "carry on the trades and businesses of accountants, book-"sellers, commercial and general advisers, publishers, and arbiters "in matters of dispute arising between societies which cannot be "settled locally, and of propagating co-operative principles and "ideas . . . with a view to the ultimate establishment of a co-opera-"tive commonwealth." A dispute having arisen as to the respective trading areas of the plaintiffs and the defendants, the matter was referred to arbitration under rule 10 of the union's rules, which provided, inter alia: "Any disagreement that may arise as to "overlapping or any other matter which cannot be settled in con-"sultation between the parties shall, in failure of conciliation, be "submitted to . . . arbitrators and their decision shall be final and "binding on all parties." An award was made in favour of the plaintiffs providing that co-operative services should be provided exclusively by them in a specified area. Before the final award was made the defendants terminated their membership of the union and refused to accept or be bound by the award. The plaintiffs then brought an action claiming a declaration that the award was binding on the defendants.

The defendants alleged, inter alia, (1) that on its true construction rule 10 did not constitute a submission to arbitration in respect of, nor entitle the arbitrators to make an award affecting, the conduct of a society after it had ceased to be a member of the Co-operative Union Ltd., and that there had to be an implied term in rule 10 to that effect; (2) that if rule 10 constituted a valid submission entitling the arbitrators to make an award affecting the defendants' conduct after ceasing membership, the contract between the parties contained in the rules of the union, in particular rule 10, was an unreasonable restraint of trade, contrary to public policy and illegal to the extent that it imposed on the defendants restrictions after they had ceased membership of the union; and (3) that the union was a trade union within the meaning of the Trade Union Acts, 1871–1913, and therefore section 4 of the Act of 1871 [1] barred the action. A trade union was defined in section 16 of the Act of 1876 as "any combination . . . for regulating the relations "between . . . masters and masters, or for imposing restrictive "conditions on the conduct of any trade or business, whether such "combination would or would not, if the principal Act had not "been passed, have been deemed to have been an unlawful combina-"tion by reason of some one or more of its purposes being in "restraint of trade":—

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[1] Trade Union Act, 1871, s. 4: "Nothing in this Act shall enable "any court to entertain any legal "proceeding instituted with the object "of directly enforcing or recovering "damages for the breach of any of "the following agreements, namely, "(1) Any agreement between mem-"bers of a trade union as such, "concerning the conditions on which "any members for the time being of "such trade union shall or shall not "sell their goods, transact business, "employ, or be employed."

Held, (1) that rule 10, prima facie, appeared to be perpetual and, where a contract was indeterminate in point of time, the onus was on those who alleged that it was impliedly limited; in a contract intended to govern the general trading spheres of two or more co-operative societies there was no room for any such limitation; that although the point fell to be decided on the general principles of construction of the terms and nature of a contract to give effect to the evident intention of the parties, the contract more closely resembled statutory rights than those arising under an ordinary commercial contract. To construe rule 10 so as to allow one party to avoid the consequences of an unfavourable award by resigning from the union would not only allow them to defeat the award and rule 10, but would give to rule 10 the very opposite construction from the obvious intention; accordingly, the submission to arbitration having been made while the defendants were still members and still bound by the rules, rule 10 entitled the arbitrators to make an award binding on them after they had ceased to be members of the union and it made no difference that they ceased to be members before the final award.

Llanelly Railway and Dock Co. v. *London and North Western Railway Co.* (1875) L.R. 7 H.L. 550 and *Palmolive Co. (of England) Ltd.* v. *Freedman* [1928] 1 Ch. 264 considered.

(2) That rule 10 merely provided the machinery for settling disputes and did not, of itself, restrain anyone—it was not until the award was made that anyone could be restrained; that there was nothing on the face of the award to indicate that it was an unreasonable restraint of trade; and that the court was not entitled to look behind the award and become, in effect, an appellate tribunal from the arbitrators. Further, the defendants were not being restricted from carrying on business as they had done prior to 1956, and it was not unreasonable in the interests of economical co-operative trading and of the public to prevent their extension to an adjacent area.

(3) That the Co-operative Union Ltd. was not a trade union because (a) the fact that it consisted of member societies who could only carry on their business by employees did not make it a combination of masters, nor, under section 4, an agreement between members of a trade union as such; it was simply a combination of traders; (b) the union did not "impose" anything, for although its objects were to carry on specified activities with a view to propagating co-operative principles, no society which did not already have as one of its objects the promotion of co-operative principles could become a member; and (c) even if rule 10 imposed restrictive conditions, it was not a "principal object" of the union as required by section 2 (1) of the Act of 1913.

ACTION.

The plaintiffs, Birtley and District Co-operative Society Ltd., and the defendants, Windy Nook and District Industrial Co-operative Society Ltd., were both co-operative trading societies, trading in the Washington Urban District in County Durham,

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registered under the Industrial and Provident Societies Act, 1893, and members of the Co-operative Union Ltd., which was also registered under the Act of 1893. The rules of the union provided by rule 2 that the objects of the union were to: "carry "on the trades and businesses of accountants, booksellers, commercial and general advisers, publishers, and arbiters in matters "of dispute arising between societies which cannot be settled "locally, and of propagating co-operative principles and ideas, and "the organising of co-operative work in all its branches, whether "such work be in connection with industries, trades or businesses, or for the promotion of education and other objects "and purposes of a similar character with a view to the ultimate "establishment of a co-operative commonwealth." By rule 10 it was provided: "No society shall be admitted into the union "unless the management is of a representative character. No "society shall be allowed to remain in membership with the "union which does not abide by its rules, conform to its aims, "and accept the decisions of the central executive confirmed by "congress. Any disagreement that may arise as to overlapping "or any other matter which cannot be settled in consultation "between the parties shall, in failure of conciliation, be submitted "to persons appointed by the Co-operative Union Ltd. as "arbitrators and their decision shall be final and binding on all "parties." The Washington Urban District was divided into five wards (Washington Ward, Washington Station Ward, Usworth Colliery Ward, Great Usworth Ward and Springwell Ward), and before 1956 the plaintiffs had a general branch on the boundary of Washington Ward and Usworth Colliery Ward, a grocery, hardware and drapery branch in Washington Station Ward, and a grocery branch in Usworth Colliery Ward; the defendants had a general branch and a greengrocery branch in Springwell Ward. Before 1956 the plaintiffs had the predominance of co-operative trade in Washington Station Ward, Washington Ward and Usworth Colliery Ward, whereas the defendants had the predominance of co-operative trade in Springwell Ward, but neither society had established a store in Great Usworth Ward, although each had customers living there who either went to the nearest shop of whichever society they preferred or would be served by vans.

As early as 1951–1952 this overlapping gave rise to disputes between the two societies. Eventually a new building estate was developed in Great Usworth Ward, and in 1955 the Washington Urban District Council allotted one shop to each society. Each of them opened such shops in 1956 within a short distance of one another. The plaintiffs having been first in the field in the Washington area (having opened their first store in 1873), and having predominance everywhere except Springwell Ward (with Great Usworth doubtful), claimed that with the exception of Springwell Ward they had an exclusive right to afford co-operative service in the area. As a result of those matters, and since negotiation and conciliation had failed, the plaintiffs referred the matter to the head office of the union for arbitration under rule 10. The defendants boycotted the arbitration and in their absence an award was made in favour of the plaintiffs on November 5, 1955, which provided that (1) co-operative service in the Washington area should be provided exclusively by the plaintiffs, and that the defendants should not canvass for customers nor trade in that area from fixed premises therein or mobile shops or vans; (2) for the purposes of the award the Washington area should be regarded as the territory administered by the Washington Urban District Council; and (3) the plaintiffs and defendants should negotiate with the urban district council for the tenancy of the shops in the Great Usworth Ward allocated to the defendants to be transferred to the plaintiffs, or the defendants should determine their tenancy forthwith. The defendants refused to accept or be bound by the award.

On February 3, 1956, the plaintiffs' solicitors wrote to the defendants saying that unless within one week they affirmed their readiness to abide by the award and comply with its terms, the plaintiffs would take action to enforce it. The plaintiffs' advisers then noticed that the award was wider in its terms than the circumstances justified, because the plaintiffs had never contended that the defendants should be precluded from co-operative trading in the Springwell Ward of the Washington Urban District Council where they had been established since 1891, and paragraph 2 of the award was therefore wider than the plaintiffs asked for and wider than the arbitrators intended. It was also realised that, in any event, paragraph 3 was untenable. To avoid any possible complications in the proposed action to enforce the award, the plaintiffs, on February 29, 1956, took out a summons for time to apply to the High Court to remit the award to the arbitrators to correct the mistakes. On March 16, the defendants also took out a summons for time to apply to the High Court to set aside the award in toto. Both summonses were headed "In the matter of the Arbitration Act, 1950." On March 20, 1956, the defendants resolved to terminate their membership of the Co-operative Union Ltd., and on March 21 notified the union accordingly. On the same day, the defendants, like the plaintiffs, appeared by counsel at the hearing of their summonses. Each party was granted time. Notices of motion having been given, on July 23 the two motions came before Pearson J., when on the plaintiffs' motion the judge remitted paragraphs 1 and 2 of the award and set aside paragraph 3, and dismissed the defendants' motion with costs. As a result the arbitrators met to reconsider their award in accordance with Pearson J.'s order. The defendants refused to attend, claiming that as they had ceased to be members of the Co-operative Union Ltd., no award could be effective against them. On September 18, 1956, the arbitrators made their amended award.

The plaintiffs, by writ issued on May 8, 1957, claimed a declaration that the arbitrators' award of September 18, 1956, was binding on the defendants, and that they were thereby precluded from providing co-operative services contrary to the terms thereof. They further claimed an injunction restraining the defendants from providing or attempting to provide co-operative service, and from canvassing or attempting to canvass for members or trade contrary to the terms of the award. The plaintiffs also claimed damages and interest.

By their reamended defence the defendants pleaded (1) that rule 10 of the Co-operative Union Ltd. was too vague and uncertain to constitute a valid submission; (2) that the terms of reference to the arbitrators were wider than any submission contained in rule 10; (3) that by certain letters, and the defendants' withdrawal from membership of the union after the reference but before the final award, they revoked the submission to, and any jurisdiction of, the arbitrators; (4) that on its true construction, rule 10 did not constitute a submission to arbitration in respect of, nor entitle the arbitrators to make an award affecting, the conduct of a society after it had ceased to be a member of the Co-operative Union Ltd., and that there must be an implied term in rule 10 to that effect; (5) that if rule 10 constituted a valid submission entitling the arbitrators to make an award affecting the defendants' conduct after ceasing membership, the contract between the parties contained in the rules, in particular in rule 10, was an unreasonable restraint of trade, contrary to public policy and illegal to the extent that it imposed on the defendants restrictions after they had ceased membership of the union; (6) that the action being in effect for specific performance of the award of September 18, 1956, the plaintiffs had been guilty of laches, in that, being aware that the defendants were at all material times continuing to trade contrary to its terms necessitating the expenditure of capital money, the plaintiffs took no action until the issue of the writ; (7) that the Co-operative Union Ltd. was a trade union within the meaning of the Trade Union Acts, 1871–1913, and the defendants relied on section 4 of the Act of 1871 [1] as a bar to the action.

At the hearing of the action, the defendants sought leave to counterclaim for an order setting aside the award on the ground of the alleged bias and misconduct of the arbitrators. Streatfeild J. refused leave: see *Birtley and District Co-operative Society Ltd.* v. *Windy Nook and District Industrial Co-operative Society Ltd.*[2]

The following report concerns only the points raised by the fourth, fifth and seventh defences. The second and sixth defences were not pressed at the trial. So far as the first defence was concerned, Streatfeild J. was unable to accept the defendants' argument. As to the third defence, his Lordship held that rule 10 constituted a valid and binding written submission to arbitration between two member societies (as they were at the date of the submission), and that it amounted to a written "arbitration "agreement" under section 32 of the Arbitration Act, 1950, and that, therefore, the authority of the arbitrators was irrevocable in law, and that neither letters written by the defendants purporting to revoke the authority of the arbitrators, nor their withdrawal from the union, constituted any effective revocation of the authority of the arbitrators.

Sir Frank Soskice Q.C. and *R. A. MacCrindle* for the plaintiffs.
Gerald Gardiner Q.C. and *Alan S. Orr* for the defendants.

The arguments sufficiently appear in the judgment. In addition to the cases referred to in the judgment, the following cases were cited in argument: on the points raised by the fourth defence: *Ayscough* v. *Sheed, Thomson & Co. Ltd.*[3]; *Bremer Oelentransport G.m.b.H.* v. *Drewry*[4]; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*[5]; on the fifth defence: *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[6]; *North-Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*[7]; *Clarke* v. *Dunraven*[8];

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[1] For footnote 1 see p. 2.
[2] [1959] 1 W.L.R. 142; [1959] 1 All E.R. 43.
[3] (1924) 19 Ll.L.Rep. 104.
[4] [1933] 1 K.B. 753.
[5] [1926] A.C. 497; 42 T.L.R. 359.
[6] [1894] A.C. 535; 10 T.L.R. 636.
[7] [1914] A.C. 461; 30 T.L.R. 313.
[8] [1897] A.C. 59; 13 T.L.R. 58.

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Aubert v. *Naze* [9]; *In re Boks & Co. and Peters, Rushton & Co.*[10]; *Taylor (David) & Son* v. *Barnett Trading Co.*[11]; on the seventh defence: *Gozney* v. *Bristol Trade and Provident Society* [12]; *Osborne* v. *Amalgamated Society of Railway Servants.*[13]

Cur. adv. vult.

December 16. STREATFEILD J. stated the facts, of which those relevant to the present report are set out above, and continued: Sir Frank Soskice's principal submission on behalf of the plaintiffs may be summarised as follows: Where parties to a dispute have by a valid contract bound themselves to refer the matter to arbitration, and the arbitrators, appointed in accordance with the contract, and acting within their authority, make an award, which is not ex facie turpis or illegal, or obviously in unreasonable restraint of trade, the parties are bound by such award, subject to their rights to move the court to remit the matter to the arbitrators, or to set the award aside for misconduct of the arbitrators, under sections 22 and 23 of the Arbitration Act, 1950. The successful party can apply to the court to have the award made an order of court, or bring an action on the award.

He submits that here is an award within the terms of reference and within the authority of the arbitrators, not tainted by misconduct, and clearly not turpis, and it cannot be said that, ex facie, it is in wrongful restraint of trade. To argue otherwise is to ask the court to act as an appellate court from the arbitrators, which can only be done by case stated. And the strength of the plaintiffs' case is, he says, that they have an award, on its face perfectly legal, and are entitled to the fruits of it. He relies on *Buccleuch (Duke)* v. *Metropolitan Board of Works.*[1]

[His Lordship considered the first three defences raised and the plaintiffs' answers to them, and having found in favour of the plaintiffs on those points, continued:] The fourth defence raised is under paragraph 6 of the defence, that on its true construction rule 10 does not constitute a submission to arbitration in respect of, nor entitle the arbitrators to make an award affecting, the conduct of a society after it has ceased to be a member of the Co-operative Union Ltd., and that there must be an implied term in rule 10 to that effect.

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[9] (1801) 2 Bos. & P. 371.

[10] [1919] 1 K.B. 491.

[11] [1953] 1 W.L.R. 563; [1953] 1 All E.R. 843.

[12] [1909] 1 K.B. 901; 25 T.L.R. 370.

[13] [1909] 1 Ch. 163; 25 T.L.R. 107.

[1] (1872) L.R. 5 H.L. 418.

Mr. Gardiner submits that, even though under rule 10 the decision of the arbitrators is expressed to be final and binding on the parties, it was clearly never intended to be binding on them after ceasing membership, any more than an ordinary club member is intended to be bound by the club rules after he has withdrawn from the club. He points out that the rules permit of a member being expelled from the union, as well as resigning, and he submits that it would be very odd if an award were to be binding, for all time, on an ex-member, after his expulsion or resignation. He submits that it is more a question of construction of the rule than of implying a term therein, but that rule 10 should be construed as though it contained a limitation to the time during which a society remains a member. In so far as any onus lies on him of showing that a contract or rule, on the face of it perpetual, is to be construed as subject to an implied limitation (see *Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.*[2]), he relies on the judgment of McNair J. in *Martin-Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.*[3]

To this submission Sir Frank Soskice returns the simple answer that such a construction would just make nonsense of the rule. It cannot have been intended, he says, that a rule, governing the settlement of disputes concerning the trading interests of co-operative societies, is to be so construed as to enable the unsuccessful party to an arbitrator's award to avoid its consequences by simply resigning membership. Still less could an actual injunction granted by the court following an award be so frustrated. On the face of it, the rule appears to be perpetual, and Sir Frank points out that, when one of these rules is intended to apply only during actual membership, it expressly says so; for example, rule 12 (2). And he submits that, where a contract is indeterminate in point of time, the onus lies on those who allege that it is impliedly limited, and that cases such as *Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.*[4] and *Winter Garden Theatre Ltd.* v. *Millennium Productions Ltd.*[5] show that the nature and terms of the contract must be regarded so as to determine whether it was intended to be perpetual or terminable on reasonable notice. In a commercial transaction, as in the *Winter Garden* case,[5] or in a case governed

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[2] (1875) L.R. 7 H.L. 567.

[3] [1955] 2 Q.B. 556, 577–580; [1955] 3 W.L.R. 212; [1955] 2 All E.R. 722.

[4] (1873) 8 Ch.D. 942; (1875) L.R. 7 H.L. 550.

[5] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.

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by the law merchant, as in the *Martin-Baker Aircraft* case,[6] it may well be that a limiting term was intended and the contract construed accordingly. But he submits that, in a contract intended to govern the general trading spheres of two or more co-operative societies, there is no room for any such limitation.

In my judgment, Sir Frank Soskice's submission is correct. I think that this feature of the case falls to be decided on the general principles of construction of the terms and nature of a contract, to give effect to the evident intention of the parties. In dealing with a contract for the sale or supply of a commodity, as in *Crediton Gas Co.* v. *Crediton Urban District Council,*[7] or concerning licences for the manufacture and trading in goods (*Martin-Baker Aircraft* case [8]), or for the occupation of premises (*Winter Garden Theatre* case [9]), the very nature, as well as the terms of the contract, may well justify the view that the contract was not intended to be permanent. But here this union consists of industrial and provident societies (which entails their registration under the Act of 1893), joint stock companies and other bodies which have for their object the promotion of co-operative principles and ideas, and it is one of the objects of the union of such members to propagate such principles and ideas and organise co-operative work, with a view to the ultimate establishment of a co-operative commonwealth. Rules 9 and 10 together are intended to regulate and prevent overlapping. Such being the nature of the contract binding on the members, affecting as it does their general relationship towards one another in any area where their trading interests may conflict, it seems to me to be much more closely akin to the nature of the contract in the *Llanelly Railway* case,[10] where the agreement not only contained terms indicating perpetuity, but as such it conferred rights of a kind contemplated by the railway legislation then in force: see the comments on that case by Lord MacDermott in the *Winter Garden* case.[11] It is true that the present case is not concerned with statutory rights. But, in my view, a contract concerning the rights of traders, bound together in a union, to trade according to the doctrines of the co-operative movement, and to adjust their difference according to those doctrines, more closely resembles statutory rights than those arising under an ordinary commercial contract. In my judgment, if I were to construe rule 10 so as to allow one party to avoid the consequences of an unfavourable

[6] [1955] 2 Q.B. 556.
[7] [1928] Ch. 174, 447.
[8] [1955] 2 Q.B. 556.
[9] [1948] A.C. 173.
[10] L.R. 7 H.L. 550.
[11] [1948] A.C. 173, 203.

award, by the simple process of backing out of the union during the proceedings, I should not only be allowing them to defeat the award and rule 10 but I should be giving rule 10 the very opposite construction from the obvious intention: see *Palmolive Co. (of England) Ltd.* v. *Freedman.*[12] In my view, therefore, the submission having been made while the defendants were still members and still bound by the rules, rule 10 did entitle the arbitrators to make an award binding on them after they ceased to be members of the union, and it makes no difference that they ceased to be members before the final award.

The fifth defence raised under paragraph 7 of the defence and particulars is that if rule 10 constitutes a valid submission entitling the arbitrators to make an award affecting the defendants' conduct after ceasing membership, the contract between the parties contained in the rules, in particular rule 10, is an unreasonable restraint of trade, contrary to public policy and illegal to the extent that it imposes on the defendants restrictions after they have ceased membership of the union.

Mr. Gardiner, I think, starts this topic at a disadvantage, because, on the strict wording of the pleading, neither rule 10 nor any other rules, by themselves, can possibly constitute a restraint of trade. The rule, which merely enables a dispute to be settled in a particular way, does not, of itself, restrain anyone. It is not until the award is made that anyone can be restrained, and possibly neither party may be. If anything restrains anyone it is the award, and not the contract or rule which merely prescribes arbitration as the means of obtaining it. However, since I am informed that in any event this case is likely to go to a higher court, I proceed to consider Mr. Gardiner's submissions on the footing that paragraph 7 of the defence, with its particulars, may be regarded as referring to the award, rather than the rule, though for myself I doubt whether they can be so regarded.

Mr. Gardiner submits that a restriction upon the trading activities of the defendants after they have ceased to be members of the union is unreasonable from the point of view of the parties, in that it is not reasonably required for the protection of the plaintiffs and other members of the union, and from the point of view of the public, in that it prevents or might prevent the defendants or others from trading as they please after ceasing membership of the union, and that, as a matter of public policy, the courts will take note of it, when asked to enforce an award.

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[12] [1928] 1 Ch. 264; 44 T.L.R. 86.

He relies in particular on *Joseph Evans & Co. Ltd.* v. *Heathcote* [13] and *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*,[14] in each of which it was a strong feature of the unreasonableness of the restraint that under the rules of the association the party restrained could not in practice withdraw from the association, and would remain indefinitely subject to a restraint which would or might put him entirely out of business. By analogy Mr. Gardiner argues that if, in spite of the right to withdraw from the union, an award is binding on a society after it has ceased membership, it is in the same position as if it had no right to withdraw. He also relies on *Hilton* v. *Eckersley* [15] and *Kores Manufacturing Co. Ltd.* v. *Kolok Manufacturing Co. Ltd.*,[16] and he finally submits that it is obviously unreasonable, both from the parties' and the public points of view, that the defendants should be precluded for ever from continuing to serve the public in an area where they have served for 65 years.

In reply to this strong argument, Sir Frank Soskice, as to the last matter, points out that it just is not so. The final award does not restrict the defendants from rendering co-operative service in Springwell Ward, where they have traded since 1891, and it is precisely because of this that the plaintiffs took steps to have the first award remitted to the arbitrators to have their obvious and admitted error as to the defendants' sphere of activities corrected. But in Great Usworth Ward, until 1956 (when the defendants opened their new shop) the most that they ever did was to deliver goods in vans to customers who lived there but who had ordered goods in the Springwell shop, and they never traded from mobile shops; whereas the plaintiffs at all material times not only delivered goods in vans to their customers who lived in Great Usworth, ordered from their original shop opened in 1873, but probably also did considerable trade from mobile shops. He therefore submits that the award does not seek to curtail the trade which the defendants have carried on since 1891, but only an extension thereof into Great Usworth Ward, which until 1956 they did not enjoy.

As regards Mr. Gardiner's main submission, Sir Frank points out that all of the four cases relied on were actions brought in the courts upon or to impeach agreements containing restrictive terms; whereas this is an action on an award which prima facie the plaintiffs are entitled to enforce. The parties by becoming

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[13] [1918] 1 K.B. 418; 34 T.L.R. 247.

[14] [1919] A.C. 548; 35 T.L.R. 354.

[15] (1855) 6 El. & Bl. 47, 66.

[16] [1959] Ch. 108; [1958] 2 W.L.R. 858; [1957] 3 All E.R. 158.

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members of the union agreed to the particular method of settling disputes, and although the defendants were unco-operative in the arbitration, the award was lawfully obtained, and, not being ex facie illegal, the courts will not look behind it, and the defendants are bound by it. He relies on *Caledonian Railway* v. *Turcan*,[17] *Elves* v. *Crofts*,[18] and on the judgment of Lord Guest in *Bellshill and Mossend Co-operative Society Ltd.* v. *Dalziel Co-operative Society Ltd.*[19]: see also *Delver* v. *Barnes*[20] and *Wohlenberg* v. *Lageman*.[21] As regards *McEllistrim* v. *Ballymacelligott Co-operative Society*,[22] Sir Frank points out that the co-operative society was there seeking to protect itself against competition generally, at the expense of a trader who, by virtue of the restriction, would be put completely out of business. Here, he contends, the plaintiffs are not seeking to put the defendants out of business, which they are free to carry on in their own area, as formerly, and they are not seeking to defeat competition generally; indeed, they have many other ordinary shopkeepers in the district who compete with them. They are only seeking, within the principles of the co-operative movement, to protect themselves and their customers (the public) from the waste of labour caused by unregulated competition within the co-operative movement itself, by securing stability in their list of customers in a particular area. They are not seeking to enrich themselves, since any additional profits effected from saving waste are returned to their members by way of dividend. And, finally, as regards the question of the absence of a time limit and the award being binding on the defendants after withdrawal from membership, he relies strongly on *Palmolive Co. (of England) Ltd.* v. *Freedman*,[23] where Lawrence L.J. said: "I now propose to deal "with the defendant's main objections. In support of his first "objection—namely, the absence of a time limit and of a power "of withdrawal—the defendant relied strongly on the decision of "the Court of Appeal in *Joseph Evans & Co.* v. *Heathcote*.[24] "That case, however, is clearly distinguishable from the present "on the ground that the agreement there (as pointed out by "Bankes L.J.[25]), provided for a state of things which might "result in the shutting down altogether of the plaintiffs' manu"facture. The plaintiffs were manufacturers of case tubes, and

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[17] [1898] A.C. 256.

[18] (1850) 10 C.B. 241.

[19] An interlocutory judgment, dated July 25, 1958.

[20] (1807) 1 Taunt. 48.

[21] (1815) 6 Taunt. 251.

[22] [1919] A.C. 548.

[23] [1928] 1 Ch. 264, 284, 285; 44 T.L.R. 86.

[24] [1918] 1 K.B. 418.

[25] Ibid. 430.

"by the agreement they had purported to bind themselves not to "sell their output except to five named persons, none of whom "was under any obligation to buy and all of whom might cease "to exist. In these circumstances, it is perhaps not to be "wondered at that the court came to the conclusion that the "absence both of a time limit and of a power of withdrawal "rendered the restraint unreasonable in the interests of the "parties. No such considerations enter into the present case, as "the agreement here could not by any stretch of imagination lead "to any such result. Moreover, the insertion of a time limit or "of a power of withdrawal in such an agreement as the present "would not only be unusual and unbusinesslike but would defeat "the object in view. In price maintenance agreements such "as this the object of the manufacturer or seller is that the "prices should be maintained so long as his particular goods are "manufactured or sold, and I know of no case where such an "agreement has contained any such limit or power. If a time "limit or power of withdrawal were inserted in such an agreement, a manufacturer or seller might find himself ruined after "having expended large sums of money in building up a profitable "trade."

In my judgment, Sir Frank Soskice's argument is correct. There is nothing on the face of the award to indicate that it is an unreasonable restraint of trade, against the interests of the parties or the public. And in my view, I am not entitled to look behind the award and become in effect an appellate tribunal from the arbitrators. The defendants have only their own stubborn attitude to blame for not taking the proper steps to oppose the plaintiffs' claim before the arbitrators, if, indeed, they had any grounds for doing so. In my view, the defendants are not being restricted from carrying on business as they did before 1956, but it is not unreasonable, in the interests of economical co-operative trading and in the interests of the public, to prevent their extension to an adjacent area. This is not a case of a mere barrier against competition for its own sake, but a means of confining co-operative trading in a particular area to one society, so that greater benefit may result to the buying public. The plaintiffs are financially able to provide exclusively the co-operative needs of the area, which under the award they are bound to do.

[His Lordship then dealt with the plea of laches, and continued:] The seventh defence raised is under paragraph 12 of the defence, that the Co-operative Union Ltd. is a trade union within the meaning of the Trade Union Acts, 1871–1913, and the defendants rely upon section 4 of the Act of 1871 as a bar to the action.

[His Lordship read section 4 of the Act of 1871 and continued:] Under this section Mr. Gardiner first submits that the co-operative union is a trade union. The definition of a trade union within the meaning of section 4 is to be gathered from section 23 of the Trade Union Act, 1871, section 16 of the Trade Union Act Amendment Act, 1876, and sections 1 (2) and 2 (1) of the Trade Union Act, 1913. The original definition in section 23 of the Act of 1871 was repealed by section 16 of the Act of 1876, except the proviso (which does not arise in this case). By section 2 (1) of the Act of 1913, a "trade union" means any combination the principal objects of which are under its constitution "statutory objects." The latter expression is defined in section 1 (2) as meaning the objects mentioned in section 16 of the Act of 1876 (plus one extra not material to this case). Section 16 of the Act of 1876 therefore defines a "trade union" for the purposes of this case as: "any combination, whether "temporary or permanent, for regulating the relations between "workmen and masters, or between workmen and workmen, or "between masters and masters, or for imposing restrictive con"ditions on the conduct of any trade or business, whether such "combination would or would not, if the principal Act had not "been passed, have been deemed to have been an unlawful "combination by reason of some one or more of its purposes being "in restraint of trade," with the qualification added by the Act of 1913 that these must be the principal objects of the combination.

Mr. Gardiner submits that the co-operative union is a "trade "union" within this definition because it is a combination for regulating the relations between masters and masters, and for imposing restrictive conditions on the conduct of their trade or business, which, he says, is one of their principal objects under rule 2.

Secondly, Mr. Gardiner contends that rule 10 constitutes an agreement between members, as such, concerning conditions on which they as members for the time being should sell or not sell their goods. Here, he says, the conditions "imposed" are that the defendants are not to sell from shops or vans in the Washington area, other than Springwell Ward.

Thirdly, Mr. Gardiner submits that an action on an award in an arbitration under the rules is a proceeding instituted with the object of directly enforcing an agreement contained in such rules.

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He relies on *Edinburgh Master Plumbers Association* v. *Munro*,[26] where, under the rules of an association, members who successfully tendered for contracts had to pay a percentage into the funds of the association. When a claim was made against a member under the rules, and the claim was disputed, an "ad "hoc" agreement was made between the parties referring the dispute to arbitration. In a subsequent action upon the award by the successful association, it being admitted and not being argued to the contrary that the association was a trade union, it was held that, although the original claim directly under the rules would have been barred by section 4 of the Act of 1871, no such restriction affected the claim under the award, based upon a new and independent agreement to refer the dispute to arbitration. Mr. Gardiner contends that had the original rule referred any dispute to arbitration the action would likewise have been barred, and was only saved by the specific reference to arbitration. He submits, therefore, that this action is a proceeding instituted with the object of directly enforcing an agreement between members of a trade union, as such, concerning conditions on which they, as members for the time being, shall or shall not sell their goods.

For the plaintiffs' answers to these submissions I am greatly indebted to Mr. MacCrindle, who, in the unavoidable absence of his leader, argued the plaintiffs' case on this point with conspicuous ability and clarity. As to Mr. Gardiner's first submission that the co-operative union is a trade union, Mr. MacCrindle, by way of introduction, indicated a neat "pointer" (which he did not claim was conclusive), namely, that by section 5 of the Act of 1871, the Industrial and Provident Societies Act, 1867, and any Act amending it (which includes the Act of 1893) do not apply to any trade union, and the registration of any trade union under, inter alia, the Act of 1893 shall be void. Of course the Registrar of Friendly Societies may make a mistake, but it is at least interesting that the registrar has, in fact, registered the Co-operative Union Ltd. as an industrial and provident society under the Act of 1893, which he would be wrong to do if it were a trade union.

Mr. MacCrindle's first main point is that the union is not, under the first leg of the definition in section 16 of the Act of 1876, a "combination for regulating the relations between masters "and masters." The fact that it consists of member societies who can only carry on their business by employees does not make

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[26] 1928 S.C. 565.

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it a combination of masters nor, under section 4 of the Act of 1871, an agreement between members of a trade union as such. He contends that it is simply a combination of traders. As to that, in my judgment, he is right.

Secondly, he also submits that under the second leg of the definition in section 16 of the Act of 1876, the union is not a "combination for imposing restrictive conditions on the conduct "of any trade or business." The operative word is "imposing." The union, he contends, does not impose anything. The objects of the union under rule 2 are to carry on the specified activities with a view to propagating co-operative principles and ideas and organising co-operative work, with a view to the ultimate establishment of a co-operative commonwealth. Mr. MacCrindle emphasises that under rule 6 no society, company or body can be admitted as a member unless it is already one which has for its object the promotion of co-operative principles and ideas. Therefore, he contends, the union does not impose on its members anything which is not there already. Its object is to encourage, not to impose, basic ideals on those who already have them, and to assist in their organisation. He relies on Lord Sumner's remarks in *Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.*[27] In this also, in my judgment, he is correct.

Thirdly, he submits further under this head that, even if rule 10 imposes restrictive conditions, it is not a "principal "object" as required by section 2 (1) of the Act of 1913. He contends that arbitration is not a principal object of a federation of societies believing in the same trading ideal, the main aim of which is to distribute profits among its customers. It is purely ancillary to the principal object that, in default of local settlement, disputes are to be settled by arbitration. No society joins the union for the purpose of benefiting by arbitration. He asks: "How can mere machinery for achieving an object be a principal "object in itself?"

Although rule 2 states that acting as arbiters in matters of dispute between societies is one of the objects of the union, I agree with Mr. MacCrindle that it is not a principal object, as laid down in section 2 (1) of the Act of 1913. Indeed, I do not think it is an object at all in itself, so much as the mere means of achieving the principal objects of the union.

On these three grounds, therefore, in my judgment, Mr. MacCrindle is correct in his submissions under the first head, and

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[27] [1924] A.C. 1, 25; 40 T.L.R. 52.

I do not think that the Co-operative Union Ltd. is a "trade "union" within the meaning of section 4 of the Trade Union Act, 1871, as amended by the Acts of 1876 and 1913. And therefore Mr. Gardiner's submission that the action is barred by section 4 fails.

I would add that I was less impressed by Mr. MacCrindle's submissions under Mr. Gardiner's second and third points. I incline to think that, if rule 10 does impose restrictions, they are restrictions "concerning the conditions on which members shall "or shall not sell their goods or transact business" within section 4 of the Act of 1871, or "restrictive conditions on the "conduct of their trade or business" within section 16 of the Act of 1876. I think that the area of their operations, as well as the venue (whether from shops or vans), is as much part of the "conditions" or "conduct" of their business as the "terms of "business," such as prices or division of profits. Again, if rule 10 does impose restrictions, an action on an award may well amount to a proceeding instituted with the object of directly enforcing an agreement concerning such restrictive conditions, if, as in this case, in addition to seeking a declaration as to their rights, the plaintiffs pray an injunction to enforce them. Mr. MacCrindle may be right in his submission that there is a distinction between a declaration as to rights, and enforcing a legal remedy. Here the plaintiffs are seeking both. But in any event, as I have already found, I do not consider that rule 10 contains any restrictive condition at all, and it is not until the award is made that any question of restriction arises.

Mr. MacCrindle also raised the interesting point that, in any event, inasmuch as section 4 is prefaced by the words "Nothing "in this Act shall enable," etc., there is nothing to prevent the plaintiffs from enforcing their rights at common law, and, therefore, provided that the award is not ex facie illegal as a restraint of trade, as I have already found it is not, the plaintiffs are left to their common law remedy, unaffected by section 4 of the Act of 1871. I need express no view about this.

He also raised the point that, in any event, section 4 only applies to agreements between "members for the time being of "such trade union," and therefore if, as I have found, the parties are bound even after ceasing to be members, it is not an agreement between members "for the time being." Again I need express no opinion. For, as already stated, I find that the Co-operative Union Ltd. is not a "trade union," and therefore paragraph 12 of the defence does not arise.

In the result, the plaintiffs succeed in this action, and are entitled to the declaration asked for. With regard to the claim for an injunction, it was argued by Mr. Gardiner on the authority of *Davies* v. *Davies* [28] that the terms of the award are too vague to be enforced by injunction. But the facts of that case were very different, and, in my view, the words of the award are sufficiently specific to be enforceable by injunction.

Accordingly, the claim for an injunction will also be allowed, as prayed, and I shall direct an inquiry as to damages.

Judgment for the plaintiffs.

Solicitors: *Herbert Reeves & Co. for William Mark Pybus & Sons, Newcastle-upon-Tyne; Sharpe, Pritchard & Co. for Watson, Burton, Booth & Robinson, Newcastle-upon-Tyne.*

C. J. E.

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[28] (1887) 36 Ch.D. 359.

PHRANTZES *v.* ARGENTI.

[1958 P. No. 2526.]

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Feb. 23, 24, 25, 26;
March 4.

Lord Parker C.J.

Conflict of Laws—Jurisdiction—Right depending on status—Enforceability outside country of domicile—Right in personam—Right to dowry under Greek legislation.

Conflict of Laws—Jurisdiction—Right depending on discretion of foreign court—Right to dowry under Greek law.

Conflict of Laws—Jurisdiction—Remedy peculiar to foreign law—Right to order condemning father to enter into dowry contract with son-in-law.

A daughter, a Greek national, who had recently married in England, claimed a declaration that under Greek law she was entitled on her marriage to be provided by her father, also a Greek national, with a dowry. Both father and daughter were residing in England and the father, inter alia, denied the fact, on which the daughter relied, that he was at any material time domiciled in Greece. By Greek law a father was obliged to constitute on behalf of his daughter entering on marriage a dowry in accordance with his fortune, the number of the children, and his social position and that of the son-in-law. The dowry was property granted to the husband and was constituted by a contract entered into with the husband by notarial deed: it might consist of present or future property, which had to be specified, and could be land or movables. Should the father fail to provide a dowry the daughter had a cause of action in the Greek courts to obtain an order condemning him to conclude a dowry contract with her husband; if abroad, the father could be condemned to enter into the contract before the Greek consul or a foreign notary public. In such proceedings the Greek court would decide what in all the circumstances was the appropriate amount of the dowry and might specify the assets to be handed over. No dowry was constituted until the father had entered into the contract so ordered, and if he did not, the only courses open to the daughter were to secure his imprisonment or bring an action for damages.

The father objected that the statement of claim disclosed no cause of action. On the trial of the preliminary issue whether, assuming that the father was at all material times domiciled in Greece, the daughter was entitled to the relief claimed:—

Held, that a father's obligation to constitute a dowry under Greek law and the reciprocal right of a daughter to have a dowry constituted, were of a nature which the English courts would recognise, and that the daughter's right, notwithstanding that it was a right in personam, and that it did not come within the definite categories of foreign rights which the courts had enforced, was one which, in principle, could be enforced in the English courts (post, pp. 33, 34).

Loucks v. *Standard Oil Co. of New York* (1918) 224 N.Y. 99 applied.

In re Macartney [1921] 1 Ch. 522 and *De Brimont* v. *Penniman* (1873) 10 Blatchford's Circuit Court Reports 436 distinguished.

But that (i), since the daughter's right was not a right to the payment of a sum of money but to an order condemning the father to enter into a contract with the son-in-law which required inquiries and decisions involving a large measure of discretion as to matters which were essentially matters for the domestic courts and their discretion, it would be wrong for our courts to claim jurisdiction (post, p. 35).

Kornatzki v. *Oppenheimer* [1937] 4 All E.R. 133 applied:

and (ii) Although a claim would not be defeated merely because English remedies were greater or less than those in the foreign country, if the machinery by way of remedies was so different as to make the right sought to be enforced a different right, it would not be enforced in this country; that there was no power in the court to give relief consistent with the daughter's claim, for even if the court granted a declaration and embarked on the necessary inquiry as to the extent of the dowry, it could do no more than order payment of the amount found to be appropriate to the daughter, which would be to enforce a right which she did not possess under Greek law, and, therefore, English law did not provide a cause of action and relief appropriate to the enforcement of her claim. The daughter, accordingly, was not entitled to the relief sought (post, pp. 35, 36).

Baschet v. *London Illustrated Standard* [1900] 1 Ch. 73 distinguished.

Weidman v. *Weidman* (1931) 174 N.E. 206 and *Howard Undertaking Co. Ltd.* v. *Fidelity Life Association* (1933) 59 S.W. (2d) 746 applied.

ACTION.

The plaintiff, Sybil Phrantzes, a Greek national, who was married in this country on December 4, 1957, brought an action against the defendant, her father, Philip Pandely Argenti, also a Greek national, claiming a declaration that she was entitled by virtue of article 1495 of the Greek Civil Code to be provided by him with a dowry as set out in that article, an account of the defendant's property and (by amendments to the writ and statement of claim delivered on February 12, 1960) an inquiry as to the amount of dowry properly payable by the defendant and such further inquiry, judgment or order as might be required to give effect to the declaration sought. Both parties were residing in this country but the plaintiff alleged that the defendant was at all material times domiciled in Greece, and that her rights in respect of his property arising from the relationship existing between them were governed by Greek law.

The defendant, inter alia, denied that he was at any material time domiciled in Greece, and objected that the statement of claim disclosed no cause of action. On April 16, 1959, Master Lawrence ordered the trial of the preliminary issue whether, on the assumption that the defendant was at all material times domiciled in Greece, the plaintiff was entitled to the relief claimed in the action.

The facts relating to Greek law sufficiently appear from the headnote and are fully stated in the judgment.

Gilbert Beyfus Q.C. and *R. I. Threlfall* for the plaintiff. English courts will entertain actions to protect and enforce foreign proprietary rights arising out of status or relationship which accrue to persons by reason of their domicile: see the first four principles set out in the introduction to Dicey's Conflict of Laws, 7th ed. (1958), pp. 9, 12 and 17. The preliminary issue assumes that the defendant is domiciled in Greece, and, if it is relevant, the plaintiff in fact is also domiciled in Greece; under Greek law the defendant is under an obligation to constitute a dowry for the plaintiff and the plaintiff is entitled to have a dowry constituted; the plaintiff's right is a proprietary right; the obligation and the right arise out of status, the right being acquired at birth, and, therefore, this action to enforce that right is of a nature such as these courts will entertain. While it does not appear that an action to enforce a foreign right of dowry has ever been brought in this country before, the right belongs to the class of proprietary or financial rights with which English law is familiar. Compare the right, in this country, which a widow had to dower, a similar financial right arising out of status: compare, also, rights arising out of the concept of community of goods in France, and in the State of California, which English courts have enforced: see *De Nicols* v. *Curlier*,[1] *In re Bettinson's Question*[2] and *De Serre* v. *Clarke*.[3] There are five exceptions to the rule that an English court will enforce such a right: (1) Where there is a question of the title or of trespass to real property situated abroad: *British South Africa Co.* v. *Companhia de Moçambique*.[4] (2) Where torts committed abroad are not tortious acts by the law of this country: *Phillips* v. *Eyre*.[5] (3) Where foreign penal or semi-penal laws are involved: *Worms* v. *De Valdor*[6] and *In re Selot's Trust*.[7] (4) In the case of foreign revenue laws: *In re Visser*[8]; *Sydney Municipal Council* v. *Bull*.[9] (5) When to enforce the right would be contrary to public policy. Since the plaintiff's right does not fall into any of those categories, there is no reason in principle why this action should not be entertained. The observations of Cardozo J. in *Loucks* v. *Standard Oil Co. of New York*[10] are adopted as part of the argument for the plaintiff. It is, therefore, for the defendant to show why the right to which the plaintiff is entitled under Greek law should not be enforced here.

Remedies are available to the plaintiff in English law. She asks for a declaration and an inquiry into the defendant's property, and goes on to ask for an order in the nature of an order for specific performance: compare the power of the court to order a settlement of a wife's property under section 24 of the Matrimonial Causes Act, 1950.

John Foster Q.C. and *Mark Littman* for the defendant. There is no general rule that all proprietary rights arising out of status will be enforced: it does not and cannot exist. There are many such rights which are not enforced, e.g., a right acquired by virtue of a divorce in a foreign country which is not the country of domicile; and there are also rights which the court will recognise but not enforce. But the plaintiff's right under Greek law is a right in personam and not a proprietary right. Nor is it in the same category as the widow's right of dower: see the definition of "dower" in Stroud's Judicial Dictionary, 3rd ed. (1952), vol. 1, p. 879.

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[1] [1900] A.C. 21; 16 T.L.R. 101.

[2] [1956] Ch. 67; [1955] 3 W.L.R. 510; [1955] 3 All E.R. 296.

[3] (1874) L.R. 18 Eq. 587.

[4] [1893] A.C. 602; 10 T.L.R. 7.

[5] (1870) L.R. 6 Q.B. 1.

[6] (1880) 49 L.J.Ch. 261.

[7] [1902] 1 Ch. 488.

[8] [1928] Ch. 877; 44 T.L.R. 692.

[9] [1909] 1 K.B. 7; 25 T.L.R. 6.

[10] (1918) 224 N.Y. 99.

The following nine propositions are advanced for the defendant: (1) The plaintiff's claim is based on a cause of action unknown to and not recognised in English law, and, therefore, it will not be enforced in an English court: *In re Macartney*.[11] (2) English law, the law of the forum, does not provide a form of action appropriate for the enforcement of the foreign right of the plaintiff, namely, the right to obtain an order against the defendant to enter into a contract of dowry with her husband, and, therefore, this action cannot be maintained: see Beale's Conflict of Laws (1935), vol. 3, para. 608, p. 1631, *Weidman* v. *Weidman*[12] and *Howard Undertaking Co. Ltd.* v. *Fidelity Life Association*.[13] (3) Under Greek law the plaintiff's right is to a dowry, the amount of which is determined according to the social position of the husband and of the father and according to the father's fortune, and to which there are the defences under Greek law of, inter alia, a marriage without consent or a fault justifying disinheritance or that the daughter has sufficient private fortune. Furthermore, the court may select certain property to be included in the contract and may specify it against the will of the defendant. All those are matters for the local law; they are within the jurisdiction of the Greek court and are not justiciable here. The questions of fact raised are of a kind which an English court will say are peculiarly for local inquiry. The concept of dowry, unlike succession, marriage or bankruptcy, which are universal, is particular. [Reference was also made to *Mandell* v. *Fogg*.[14]]

(4) If the plaintiff's right is one which the court will recognise, it will not be enforced, because it is a right to obtain an order for which there is no machinery here. An English court will not order a defendant to enter into a contract with, and to transfer property to, a person who may not be a party to the action. (5) The claim for a declaration or for an inquiry is not founded on any legal right; the defendant is not liable to account, and the

[11] [1921] 1 Ch. 522.
[12] (1931) 174 N.E. 206.
[13] (1933) 59 S.W. (2d) 746.
[14] (1903) 94 Am.State R. 667; 66 N.E. 198.

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relief claimed does not include the foreign legal right claimed, namely, the right to an order that the defendant enter into a contract of dowry with the husband. (6) While the status of father and daughter is recognised by English law, the incident attaching to the status of the father to constitute a dowry for the daughter will not be recognised as being an incident unknown to English law and, if recognised, will not be enforced. (7) Any remedies which can be granted by an English court to enforce the right possessed by the plaintiff under Greek law would alter the nature of her Greek right and would for that reason not be granted by an English court. (8) There is no authority that a foreign statutory right in personam can be directly enforced in England independently of any contract or tort. In *De Nicols* v. *Curlier* [15] the title to property was based on the marriage contract, and that case, therefore, was of a quite different nature. [Reference was also made to *In re De Nicols*.[16]] (9) The plaintiff's claim is contrary to the established policy of this country, since it would involve a recognition of the permanent right of a child to require her father or mother to enter into a dowry contract with her husband.

More particularly, reliance is placed on *In re Macartney*.[17] Section 9 of the Administration of Justice Act, 1920, in setting out the circumstances in which a judgment obtained in the British Dominions may be ordered to be registered, embodied the common law on this matter; see also section 3 (1) of the Arbitration (Foreign Awards) Act, 1930, and section 4 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and compare the views expressed in Dicey's Conflict of Laws, 7th ed., pp. 1005 and 803, 3rd ed. (1922), p. 452 and note (*p*), and 5th ed. (1932), p. 470 and note (*n*). Those statutory provisions do indicate that at common law it was a defence to the enforcement of a foreign judgment or award that the cause of action was unknown to English law; if so, a fortiori, the right giving rise to the cause of action cannot be enforced. At its lowest, the fact that it is debatable whether such a judgment or award can be enforced shows that the right itself cannot be enforced. The plaintiff's cause of action arises under article 1495 of the Greek Civil Code and, even if it were a claim for money simpliciter, would not come within any cause of action in English law. An action in personam under a foreign statute will not be maintained unless the right giving rise to it is within one of the recognised categories which these courts have enforced.

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[15] [1900] A.C. 21.

[16] [1900] 2 Ch. 410; 16 T.L.R. 461.

[17] [1921] 1 Ch. 522.

[LORD PARKER C.J. Assuming that it is a proprietary right, why in principle will it not be enforced merely because it is unknown to our law?]

English private international law is empirical. Judicial decisions have established certain categories of rights arising out of status which are recognised and enforced. [Reference was also made to Dicey's Conflict of Laws, 7th ed., pp. 9, 13, 223, 225, 226; Cheshire's Private International Law, 5th ed. (1957), p. 32; *Baindail* v. *Baindail*[18]; *De Brimont* v. *Penniman*,[19] and *Loucks* v. *Standard Oil Co. of New York*.[20]] If the proposition for the plaintiff is right, it would involve the formulation of a broad theory covering such matters as affiliation, alimony, the right to a dowry, not only, as here, by a female child, but also, if it existed in some other country, of a male child, the recovery of maintenance by legitimate or illegitimate children, or by parents from their children, and would have serious repercussions in English law. English courts derive their principles from analogy and legal reasoning and ethical and social considerations; the court, therefore, must look at the foreign right and see whether, on the facts proved, it can be enforced under the English rules of conflict of laws. The question is: Is it the kind of right these courts will enforce? The only foreign statutory rights which will be enforced are those coming within the headings of infants, parental authority, lunacy, marriage, bankruptcy and succession; but see the statement in Dicey's Conflict of Laws, 7th ed., p. 403, that the court has no jurisdiction to enforce the duty under a foreign statute of parents to maintain an adult child or of a child to maintain his parents. To enforce this right would be at variance with the established principles of English private international law.

The inclusion of specific property is part of the substantive foreign law, and it is contrary to the policy of our law to order the defendant to conclude a contract with a third party in which specific property is included. No comparison can be drawn with orders relating to the settlement of a wife's property under section 24 of the Matrimonial Causes Act, 1950. Apart from statute, there is no power to make such an order: *In re Leigh*.[21] Moreover, the machinery of a settlement is quite unlike the Greek order that the defendant enter into a contract with his son-in-law; nor is the dotal contract itself like a settlement. Further, the order involves an inquiry which the court has no power to make: it would necessarily involve the examination of the defendant as to his fortune, but he is not an accounting party. [Reference was also made to Bullen and Leake's Precedents of Pleadings, 11th ed. (1959), p. 70.] The Greek procedure in the inquiry as to the father's fortune is quite different from English procedure on an inquiry, and the inquiry itself is not one known to our courts; it would not be as to damages, or as to the transfer of property, but as to the extent of a foreign right, requiring the exercise of the discretion of the Greek court and the application of principles of Greek law: it is, therefore, outside the scope of the authority of this court.

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[18] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342.

[19] (1873) 10 Blatchford's Circuit Court Reports 436.

[20] 224 N.Y. 99.

[21] (1888) 40 Ch.D. 290; 5 T.L.R. 138 (C.A.).

[LORD PARKER C.J. referred to *Kornatzki* v. *Oppenheimer*.[22]]

That case supports the submission for the defendant.

The only jurisdiction of this court is to enforce the plaintiff's actual right under Greek law, but there is no machinery for, and the court would not make, the ultimate order, which would have to be an order in the form of a mandatory injunction, requiring the defendant to enter into a dotal contract to enforce that right. The declaration sought, therefore, is not founded on any substantive relief and should not be made: *Guaranty Trust Company of New York* v. *Hannay & Co.*,[23] and see *Dysart (Earl)* v. *Hammerton & Co.*,[24] in particular *per* Cozens-Hardy M.R.,[25] approved in this respect in *Hammerton & Co.* v. *Dysart (Earl)*[26]; see also *Nixon* v. *Attorney-General*.[27]

Beyfus Q.C. in reply. The argument for the defendant ignores the fact that this is an action by a Greek national domiciled in Greece against a Greek national domiciled in Greece to enforce an obligation falling on him under his own national law. *In re Macartney*[28] is not against the plaintiff. There was there no question of a foreign domicile. Nor was there a foreign domicile in *De Brimont* v. *Penniman*,[29] where the decision was based on public policy and it was emphasised that the foreign law was a local law. The obligation in this case may arise under a local foreign law, but the defendant here is domiciled in the country of that law and it is irrelevant that he is resident here. *Baindail* v. *Baindail*[30] is a strong example of the way in which English courts will enforce a personal law; and see Wolff's Private International Law, 2nd ed. (1950), pp. 389, 390, where dowry is specifically instanced [para. 367]. [Reference was also made to *De Nicols* v. *Curlier*[31] and *In re Bettinson's Question.*[32]]

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[22] [1937] 4 All E.R. 133.

[23] [1915] 2 K.B. 536 (C.A.).

[24] [1914] 1 Ch. 822; 30 T.L.R. 379 (C.A.).

[25] [1914] 1 Ch. 822, 833, 834.

[26] [1916] 1 A.C. 57; 31 T.L.R. 592.

[27] [1930] 1 Ch. 566; 46 T.L.R. 246.

[28] [1921] 1 Ch. 522.

[29] 10 Blatchford's Circuit Court Reports 436.

It is not accepted that *In re Macartney*[33] was rightly decided on the second ground or that it is authority that a foreign right will not be enforced if it is unknown to English law. The basis of that decision was not that the action would not lie because it was unknown to English law, but that it could not be maintained for reasons of public policy or of a similar nature; the exclusions provided for by section 9 of the Administration of Justice Act, 1920, are on those grounds: see, generally, Wolff's Private International Law, 2nd ed., p. 266, and Dicey's Conflict of Laws, 7th ed., pp. 1004, 1005. It cannot be suggested that it would be contrary to public policy in that sense to enforce a foreign right to dowry in the circumstances of this case. It is not a question whether a right falls within a particular rule, but the general principle is that, apart from public policy, a right proved to have been duly acquired under a foreign system of law will prima facie be protected in the English courts, and it is for the person seeking to dispute the right to show that it falls into one of the recognised exceptions. [Reference was also made to Schmitthoff's The English Conflict of Laws, 3rd ed. (1954), p. 54.] The plaintiff's right is a proprietary right or, at the lowest, in the nature of a proprietary right. It is in the same class as a right of succession, for under Greek law a dowry is part of a daughter's inheritance in advance and, therefore, should follow the law of the domicile: *De Nicols* v. *Curlier*,[34] in particular *per* Lord Halsbury L.C.,[35] *Selkrig* v. *Davies*[36] and *Coldingham Parish Council* v. *Smith.*[37]

It is no defence to say that the court could not order the defendant to execute the contract of dowry. When an English court entertains a foreign cause of action it will give its own remedy although the foreign court might not have given that remedy: see *Baschet* v. *London Illustrated Standard*[38] and Dicey's Conflict of Laws, 7th ed., p. 1089. The plaintiff, therefore, is entitled to such relief as the court can give, and the right

[30] [1946] P. 122.
[31] [1900] A.C. 21.
[32] [1956] Ch. 67.
[33] [1921] 1 Ch. 522.
[34] [1900] A.C. 21.
[35] Ibid. 27.
[36] (1814) 2 Rose 97, 291 (H.L.).
[37] [1918] 2 K.B. 90.
[38] [1900] 1 Ch. 73.

to damages is not excluded. But a Greek dotal contract is more in the nature of a conveyance than a contract and there is ample jurisdiction and machinery to grant the relief for which she asks: compare section 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, which recognises the inherent jurisdiction of the court, and Seton's Judgments and Orders, 7th ed. (1912), vol. 1, pp. 416 et seq. The court is not necessarily being asked to specify the property to be included in the dowry, and there is jurisdiction to order a defendant to pay money to a third person not a party to the action: *Ascherson* v. *Tredegar Dry Dock and Wharf Co. Ltd.*[39] It is conceded that a declaration, unless followed by substantive relief, is discretionary, but it should not be assumed that the defendant would not comply with any declaration made. Under sections 23 and 24 of the Matrimonial Causes Act, 1950, the court is well used to considering the social position of persons in whose favour an order is being made; this court can go into all the relevant matters as well as the Greek court could; since the defendant is resident in this country it might be in a better position to do so than the Greek court.

Cur. adv. vult.

March 4. LORD PARKER C.J. read the following judgment: The plaintiff is the daughter of the defendant. Both are nationals of the Kingdom of Greece at present residing in this country. The plaintiff on December 4, 1957, married in this country according to the rites and ceremonies of the Eastern Orthodox Greek Church and thereupon, so it is alleged, the defendant under Greek law became by virtue of his relationship to the plaintiff obliged to provide a dowry for her. He has failed to do so and in these proceedings she seeks to enforce that obligation, relying on the fact, as it is alleged, that the defendant is domiciled in Greece. By his defence the defendant alleges that he is not domiciled in Greece and, in any event, contends that the statement of claim discloses no cause of action and that the plaintiff is not entitled to the relief claimed.

The matter comes before me on a preliminary issue ordered by Master Lawrence on April 16, 1959, namely, "whether on the "assumption that the defendant was at all material times "domiciled in Greece the plaintiff is entitled to the relief "claimed." By a further defence delivered by leave of the master after that order the defendant alleged that in any event he had since the issue of the writ provided for the plaintiff under a deed made under the laws of Liechtenstein, and that such provision was under Greek law of a character and an extent sufficient to discharge him from providing a dowry. In allowing this further defence to be delivered the master made no alteration in the terms of the preliminary issue even though it was brought to his attention. Accordingly, I ruled that the only matter with which I would deal was the issue as ordered which arose under the original pleadings.

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[39] [1909] 2 Ch. 401.

The first question which arises is as to the position under Greek law which is, of course, a question of fact. One Greek lawyer was called on each side and while at one time there appeared to be a complete divergence of opinion on certain points, there was in the end little, if any, difference between them. I find the position to be as follows:

For many centuries it has been the custom and, indeed, the law in Greece for a father to provide a dowry for his daughter on her marriage. The law was codified in 1940 and the Code came into force in 1946. Under that Code the relations between parents and children are governed by the law of the last common nationality of the father and child, and failing this, by the law of the nationality of the father at the time of the birth of the child (see article 18). The father is obliged to constitute on behalf of his daughter entering upon marriage a dowry in accordance with his fortune, the number of his children and his social position, and in accordance with the social position of the daughter's husband. The only exceptions are: (1) if, in the light of his other obligations, the father is not in a position to constitute a dowry without endangering his own proper maintenance; (2) if and so long as the daughter possesses a sufficient fortune of her own to constitute a suitable dowry; (3) if the daughter, being a minor, marries without the father's consent; (4) if the daughter has committed such a " fault " as would justify disinheritance (see articles 1495 and 1497).

If the father is dead or not in a position to constitute a dowry the obligation devolves upon the mother (article 1496). The husband is the head of the family and decides on all matters relating to the marital life (article 1387). He further bears the burdens of the matrimony (article 1398).

The dowry is the property granted to the husband either by the wife, if she is possessed of a sufficient fortune, or by the parent on the wife's behalf, to lighten the burdens of matrimony. It is constituted by a contract entered into with the husband, which contract must be entered into by a notarial deed (articles 1406 and 1402), that is a deed prepared by and entered into before a notary public who is a public servant, after which the assets comprised in it are handed over.

The subject of the dowry may either consist of present or of future property, which must, however, be specified (article 1410). It can consist of land or movables. As regards movables these will become the property of the husband, unless the dowry contract otherwise provides (article 1412). The husband can, with the consent of the wife, alienate that property (article 1416). On the other hand, immovable property, unless the dowry contract otherwise provides, becomes and remains the property of the wife, but the husband will, during the marriage, have the management and usufruct thereof (articles 1412 and 1414). The husband can only alienate immovable property with the permission of the court (article 1417). This permission will only be given in the case of great need or where a profit will result. The produce of the sale will then become the dowry.

A dowry may also include by assignment the usufruct to which the father is entitled arising from property not in his ownership. It may include usufruct arising for a lesser time than the marriage. It may also include the right of habitation in particular premises without paying rent. A daughter also has a right to share in her father's estate. If she has had a dowry, that will be taken into account in deciding the amount of her inheritance.

Should the father fail to comply with his obligation in regard to the provision of a dowry, the daughter, and the daughter alone, has a cause of action in the Greek courts to obtain an order condemning her father to conclude a dowry contract with her husband before a notary public who may or may not be named. If the father is abroad he may be condemned to enter into the contract before the Greek consul or a foreign notary public. In such proceedings the court will decide what in all the circumstances indicated above is the appropriate amount of the dowry and may specify the assets to be handed over. In these proceedings the husband may or may not intervene as he thinks fit. No dowry is constituted until the father has entered into the dowry contract so ordered. In the unlikely event of the father failing to enter into a contract so ordered, the experts on Greek law were of opinion that the only courses open were either to secure his imprisonment or to bring an action for damages.

The only possible exception to the principle that no dowry is constituted until the dowry contract has been entered into arises when the dowry or part of it is to consist of land and the husband has intervened in the proceedings. In such a case, if the father refuses to enter into the dowry contract it may be that the husband could make a unilateral declaration of acceptance and then register that in the Land Registry as a document of title.

That being the state of the Greek law, the contentions put forward on behalf of the plaintiff can be simply stated as follows: (1) That the issue to be determined assumes that the defendant is domiciled in Greece. (2) That by reason of the relationship or status of the parties, there arose on the plaintiff's birth or on her marriage an obligation under Greek law on the defendant to constitute a dowry on her behalf. (3) That the right to have such a dowry constituted is a proprietary right. (4) That prima facie the courts of this country will entertain an action to enforce proprietary rights arising out of status which accrue according to the law of the father's domicile. (5) That the case does not come within any of the well-known exceptions, e.g., as being contrary to public policy, penal in character, etc. Granted that no such action has ever been brought in this country before there is nothing in principle, so it is said, to prevent our courts from entertaining such an action.

Points (1) and (2) above cannot be controverted. Further, it must be, I think, conceded that whether or not the father's obligation to constitute a dowry and the reciprocal right of the daughter to have one constituted on her behalf can be enforced in this country, the obligation and the right are of such a nature as these courts will recognise. But on all other points there is little, if any, agreement.

In the first place, it is said on behalf of the defendant that even if what is sought to be enforced here is a proprietary right, which is denied, it will not be enforced unless it comes within one or other of the definite rules enumerated by Dicey, e.g., in regard to infants, marriage, succession or bankruptcy. To go outside those rules would lay the way open to the enforcement of a number of rights which it is said these courts have never enforced. For example, the English courts will not enforce the duty under a foreign system of law of a parent to maintain his child or vice versa, cf. Dicey's Conflict of Laws, 7th ed. (1958), p. 403. Again, in *In re Macartney*,[1] the court was asked to enforce the judgment of a Maltese court condemning the testator's estate to provide maintenance for his illegitimate daughter.

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[1] [1921] 1 Ch. 522.

Astbury J., while refusing to enforce the judgment on the ground that the recognition of an illegitimate child's right under Maltese law to be permanently maintained was contrary to public policy, went on to hold that the action could not be entertained on the ground that the judgment obtained was of such a character that it would not have supported an action in England. In advancing this second ground the judge followed the New York case of *De Brimont* v. *Penniman.*[2] In that case a French citizen had married in France the daughter of two United States citizens. The wife died, leaving a child. Under French law the father-in-law and mother-in-law were bound to provide an allowance to the father for the support of the child. The father obtained the judgment of a French court against them while they were in France, requiring them to provide an annual allowance. On their return to the United States of America the father sued them in the American courts to recover arrears. Woodruff J. refused to entertain the action. He held that the French law and the decree made under it were local in their nature and operation, were designed to guard against pauperism and were not of universal acceptance like judgments founded upon contract or other recognised rights. He said[3]: "The decree in question proceeds upon "the declaration of an obligation not in conformity with our laws, "not known to the common law, and upon the continuance of the "obligation itself after the relationship out of which it is deemed "to have arisen has ceased by the death of the person through "whom the affinity was traced." He went on to say[4]: "What-"ever obligation or duty lies at the foundation of the claim . . . "is the creature of positive statute, framed for the people of "France, to regulate their domestic concerns, protect the public, "and guard against pauperism and its evils. Statutes in some "respects similar are found in England, and in most, if not all, "of the States in this country. The duty of parents . . . to "provide for the necessary support of those relatives, and prevent "their becoming a charge to the public, is declared and enforced. "Such regulations are local in their nature, and in their applica-"tion, and so are the orders for their enforcement. . . . Orders "of filiation are of a similar character. . . . The principle "upon which foreign judgments receive any recognition in our "courts, is one of comity. It does not require, but rather forbids "it, when such a recognition works a direct violation of the policy

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[2] (1873) 10 Blatchford's Circuit Court Reports 436.

[3] Ibid. 440.

[4] Ibid. 440, 441.

"of our laws, and does violence to what we deem the rights of "our own citizens. The courts . . . will be slow to hold, that, "whenever an American citizen shall visit France, and reside "there temporarily, with his family, his son or his daughter, by "a rash or imprudent marriage, can cast upon the parents, "mother as well as father, the perpetual burthen of an annuity, "for the support of the wife or husband. So long as such "residence continues, no doubt, the parents must submit to the "laws of France. The orders of her courts may be enforced "against them, as those laws may prescribe; but, in a matter "of this kind, those laws must be executed there, and such "decrees can have, and ought to have, no extra-territorial "significance. They rest upon no principles of universal acceptation, like the obligation of contracts, or the protection of "generally recognised, private, personal rights. No disposition to "deal with foreign judgments, so as to promote the ends of "justice, demands that such decrees should be arbitrarily enforced "in our courts."

Some criticism has been made of the decision in *In re Macartney*, cf. Wolff's Private International Law, 2nd ed. (1950), pp. 266 and 267, in so far as the second ground of the decision is concerned. Be that as it may, I think that the present case is quite different from *In re Macartney*[5] and *De Brimont* v. *Penniman.*[6] There is no question here of the foreign law being a law against pauperism. It is, moreover, intended to have extra-territorial effect since the Greek courts will, as I have said, condemn a father resident abroad to enter into a contract before the Greek consul or a foreign notary public.

Indeed, if this were the only point in the case I would hold that this was a right which could be enforced here. As Cardozo J. said in *Loucks* v. *Standard Oil Co. of New York*[7]: "If aid is to "be withheld here, it must be because the cause of action in "its nature offends our sense of justice or menaces the public "welfare. . . . Our own scheme of legislation may be different. "We may even have no legislation on the subject. That is not "enough to show that public policy forbids us to enforce the "foreign right. A right of action is property. If a foreign statute "gives the right, the mere fact that we do not give a like right "is no reason for refusing to help the plaintiff in getting what "belongs to him. We are not so provincial as to say that

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[5] [1921] 1 Ch. 522.

[6] 10 Blatchford's Circuit Court Reports 436.

[7] (1918) 224 N.Y. 99, 110, 111.

"every solution of a problem is wrong because we deal with it "otherwise at home. Similarity of legislation has indeed this "importance: its presence shows beyond question that the "foreign statute does not offend the local policy. But its absence "does not prove the contrary. It is not to be exalted into an "indispensable condition. The misleading word 'comity' has "been responsible for much of the trouble. It has been fertile in "suggesting a discretion unregulated by general principles (Beale, "Conflict of Laws, para. 71). The sovereign in its discretion "may refuse its aid to the foreign right. . . . From this it has "been an easy step to the conclusion that a like freedom of "choice has been confided to the courts. But that, of course, is a "false view. . . . The courts are not free to refuse to enforce "a foreign right at the pleasure of the judges, to suit the "individual notion of expediency or fairness. They do not close "their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some "deep-rooted tradition of the common weal."

The next point taken on behalf of the defence is that the right under Greek law is not a proprietary right at all. It is, so it is said, only a right in personam; a right to get the court to condemn the father to enter into a dowry contract. This, as it seems to me, must be the correct position. True it is connected with succession, being on account of the daughter's inheritance, but the action is an action in personam. However, in my judgment, it matters not what label is given to the right. It is, I think, a right which could be enforced here if, for instance, it was a right to payment of a fixed sum of money or a definite proportion of the father's fortune simpliciter.

It is, however, at this point that the plaintiff's difficulties occur. The right is not the right to the payment of a sum of money. It is the right to an order condemning the father to instruct a notary public to draw up a dowry contract in accordance with the directions of the court, and to enter into that contract with the son-in-law who may not even be a party to the proceedings. Before the order can be made the court must inquire into the extent of the father's fortune and that of his daughter. The court must further consider the respective social position of the father and son-in-law, that is their positions in the Greek or other community where each is living, and decide what is the appropriate amount of dowry. It must decide, if the point is raised, whether the daughter has committed a fault within article 1497. It will often have to decide in all the circumstances what the dowry is to consist of, how much of it shall be land, how much movables, whether any part of it is to consist of the usufruct from property and, if so, for how long it is to be granted, whether the use of a house free of rent is to be provided, and, in addition, what are to be the terms as to ownership of the dowry whether movable or land (article 1412). Specimen contracts were put in evidence. All these inquiries and decisions are essentially matters for the domestic courts, and matters largely for the discretion of those courts and not our courts. It is true that in *Kornatzki* v. *Oppenheimer*[8] Farwell J. held that he was able to evaluate the sum which a German court in all the circumstances of the case would award as payable in discharge of a pre-war debt based on a provision of the German Civil Code, which provided that the debtor was bound to effect the performance of his obligations according to the requirements of good faith, ordinary usage being taken into consideration. He came to the conclusion in that case that the evaluation was really a question of fact which could be determined by the court in England, and that it was not a matter of discretion at all. He, however, clearly took the view that if discretion had entered into the matter it would have been a matter for the German courts alone, and that he would not have had any jurisdiction in the matter. Here it seems to me that the considerations which I have enumerated above, taken as a whole, must involve a very large measure of discretion, and that it would be quite wrong for our courts to claim jurisdiction in the matter.

The matter does not end there since, in my judgment, the lex fori, English law, does not provide a cause of action and relief appropriate to the enforcement of the foreign right, namely, a right to obtain an order condemning someone to enter into a contract in a particular form with a person not even a party to the proceedings. It is true, of course, that a plaintiff seeking to enforce a foreign right here can demand only those remedies recognised by English law, and that the claim will not be defeated merely because those remedies are greater or less than those in the courts of the foreign country: cf. Dicey's Conflict of Laws, 7th ed., p. 1089, and *Baschet* v. *London Illustrated Standard*.[9] But the remedies available must harmonise with the right according to its nature and extent as fixed by the foreign law: cf. Cheshire, Private International Law, 5th ed. (1957), pp. 667 and 668. Put another way, if the machinery by way of remedies here is so different from that in Greece as to make the right sought to be enforced a different right, that right would not, in my judgment, be enforced in this country. This matter has been considered in the United States of America. Thus the Restatement of the Law of Conflict of Laws [American Law Institute, 1934], para. 608, states: "If no form of action is provided by the law of a state "for the enforcement of a particular foreign right, no action "to enforce that right can be maintained in the state. *Comment*: "*a*. The form of action is a matter of procedure. A court will "not invent a new form of action, unknown to the law of the "forum, in order to give a remedy on a foreign cause of action."

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[8] [1937] 4 All E.R. 133.

[9] [1900] 1 Ch. 73.

Again, in Beale's Treatise on the Conflict of Laws (1935), vol. 3, para. 608, p. 1631, it is stated: "If the law of the forum "does not provide a form of action appropriate for the enforcement of the foreign right the action may not be maintained." See also *Weidman* v. *Weidman* [10] and *Howard Undertaking Co.* v. *Fidelity Life Association.*[11]

In the present case, even if the court granted a declaration and embarked on the necessary inquiry as to the extent of the dowry, it could do no more than order payment of the amount found to be appropriate and payment thereof to the plaintiff. That, however, would be to enforce a right which the plaintiff does not possess under Greek law. True, the courts here have power to order a deed to be entered into by a husband to secure payment of maintenance or to order a settlement of a wife's property, but that is a jurisdiction given by statute: cf. sections 23 and 24 of the Matrimonial Causes Act, 1950. Reference was also made to section 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, dealing with the execution of instruments which a person fails when directed to enter into. But that section does not itself give any right to direct a person to enter into a contract, and I know of no power in the court, inherent or otherwise, which would enable the court to give relief which was consistent with the plaintiff's right under Greek law.

For these reasons I have come to the conclusion that the answer to the question raised in the preliminary issue is "No." Since it is admitted that the claim fails if, contrary to the assumption in the issue, the defendant is not domiciled in Greece, it follows that the claim must be dismissed.

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[10] (1931) 174 N.E. 206; 274 Mass. 118.

[11] (1933) 59 S.W. (2d) 746.

Judgment for the defendant with costs.

Solicitors: *Trower, Still & Keeling; Stoneham & Sons.*

J. F. L.

LEGGE AND OTHERS v. MATTHEWS AND ANOTHER.

[Plaint No. PP. 262.]

C. A.
1960
Feb. 9, 10, 11, 12.

Lord Goddard, Pearce and Upjohn L.JJ.

Landlord and Tenant—Rent restriction—Decontrol—Sublease—Part of premises lawfully sublet—Decontrol of whole premises—Whether subtenant of part forming separate dwelling-house protected against head landlord—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3)*—Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 41*—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *ss.* 11, 27 (2), *Sch.* 4, *paras.* 1, 2.

In 1953 the tenant of premises within the protection of the Rent Acts lawfully sublet to the second defendant the ground floor, comprising a separate dwelling-house for the purposes of those Acts. After April, 1957, the tenant remained in possession of the premises as a statutory tenant until, in July, 1957, the premises as a whole were decontrolled by the Rent Act, 1957. The rateable value of the ground floor was, however, below the limits of the decontrolling provision. In October, 1958, an order for possession was made against the tenant, but the operation of the order was suspended for six months. The landlords also sought to recover possession against the subtenant:—

Held, (1) that section 41 of the Housing Repairs and Rents Act, 1954[1] (which applied not only where the superior letting was contractual but also where it had become statutory and covered all cases where the superior letting was of a dwelling-house which at the moment was not controlled) applied so that the Rent Acts operated as if the landlords had let the ground floor under one letting and the rest of the premises under another.

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[1] Housing Repairs and Rents Act, 1954, s. 41: "Where a dwelling-"house to which the Act of 1920 "applies (hereinafter referred to as "'the sub-let part') forms part of "premises, not being such a dwelling-"house, which have been let as a "whole on a superior letting, then "from the coming to an end of the "superior letting the operation of the "Rent Acts in relation to the sub-"let part shall be the same as if in "lieu of the superior letting there had "been separate lettings of the sub-let "part and the remainder of the pre-"mises, for the like purposes as under "the superior letting, and at rents "equal to the just proportion of the "rent under the superior letting."

(2) That, accordingly, the ground floor remained within the ambit of the Rent Acts and, by virtue of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,[2] the subtenant was deemed to become the tenant of the landlords.

Cadogan v. *Henthorne* [1957] 1 W.L.R. 1; [1956] 3 All E.R. 851 applied.

(3) Accordingly, the landlords were not entitled to an order for possession.

Quaere, whether the alteration as from the date of decontrol in the terms of the occupation of the head tenant during the transitional period of grace under Schedule 4 to the Rent Act, 1957, amounts to a determination of the head tenant's interest, or is more properly regarded as a mere variation not amounting to a determination, and whether, if it amounts to a determination, the tenancy between the landlord and the subtenant, which is to be deemed to exist by virtue of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, can exist during the transitional period whilst the former tenant is still in possession.

APPEAL from Judge Clark sitting at Clerkenwell County Court.

In 1953 premises known as 322, Hornsey Road, Holloway, within the protection of the Rent Acts, were let to one Alice Matthews, and in the same year she lawfully sublet the ground floor to one Ann Bodger. The ground floor comprised a separate dwelling-house for the purposes of the Rent Acts. On April 22, 1957, a notice of increase of rent, reflecting an increase of rates, was served on the tenant so that, thereafter, she remained in possession as a statutory tenant. On July 6, 1957, the premises as a whole were decontrolled by virtue of sections 11 (1) and 27 (2) of the Rent Act, 1957, because the rateable value of the premises was £48. The ground floor had, however, a rateable value of only £16 and was not, therefore, within the scope of the decontrolling provision. On December 5, 1957, the landlords, the trustees of M. C. A. Legge's marriage settlement, served on the tenant a notice in accordance with paragraph 2 of Schedule 4 of the Rent Act, 1957, requiring her to render up possession on October 6, 1958. At the expiry of that notice the landlords applied for an order for possession against her but she applied for a suspension. The county court judge made the order but suspended it for six months. The plaintiffs also sought possession against the subtenant.

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[2] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15: "(3) Where the interest of a "tenant of a dwelling-house to which "this Act applies is determined, "either as the result of an order or "judgment for possession or eject- "ment, or for any other reason, any "subtenant to whom the premises or "any part thereof have been lawfully "sublet shall, subject to the provisions "of this Act, be deemed to become "the tenant of the landlord on the "same terms as he would have held "from the tenant if the tenancy had "continued."

The county court judge held that the subtenant was still protected and he refused to order her to deliver up possession. The plaintiffs appealed.

[The relevant provisions of the Rent Act, 1957, are set out in the judgment of the court.]

Christopher B. Priday for the landlords, plaintiffs. The landlords are entitled to possession against the subtenant after the transitional period of grace given on decontrol comes to an end. At common law a subtenant's interest ends automatically with the head tenancy, but it is said for this subtenant that she is protected by section 15 (3) of the Act of 1920 and section 41 of the Act of 1954, read either separately or together. Neither section was directed to the present circumstances and, it is submitted, neither protects her. It is a condition precedent to the operation of section 15 (3) that the head tenancy which determines is of a dwelling-house to which the Rent Acts apply. That is not so in this case, for the Acts ceased to apply to the dwelling-house as a whole when the Act of 1957 came into force, but the head tenancy went on for another 15 months. Consequently, when the tenancy ultimately determined, it could not be said of the dwelling-house that it was then one to which the Rent Acts applied.

The interest of the head tenant during those 15 months was the same as that which she had enjoyed before decontrol, except that the Rent Acts no longer applied. But even if, contrary to that submission, the interest of the tenant had changed in nature on decontrol, there is no support in the Act for the conception of a direct relationship between the landlords and the subtenant lying dormant during the transitional period.

Section 41 of the Act of 1954 only applies if the superior letting which determines was a contractual tenancy which had never been subject to the Rent Acts, as in *Cow* v. *Casey*.[3] A statutory tenancy is a mere status of irremovability and not a "letting."

[LORD GODDARD referred to the first mention of "statutory "tenant" in 1919 in *Hunt* v. *Bliss*.[4]]

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[3] [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197, C.A.

[4] (1919) 36 T.L.R. 74, D.C.

In this case section 41 cannot operate, because by the material date, July 6, 1957, the contractual tenancy had ended and the head tenant was a statutory tenant.

If it had been intended that subtenants should be protected, express language would have been used, as in section 15 (3), and in section 41 after *Cow* v. *Casey*[5] and in section 15 of the Landlord and Tenant Act, 1954, after *Knightsbridge Estates Trust Ltd.* v. *Deeley*.[6] Protection would seem to be contrary to the general intention of this decontrolling Act. It may well be that a subtenant of a part of a house is worse off than a direct tenant of similar premises, but the Rent Acts operate arbitrarily.

R. E. Megarry Q.C. and *Peter G. Mason* for the subtenant, the second defendant. The landlords contend that the Act of 1957 was a decontrolling Act and that it is therefore not surprising that it should leave a subtenant unprotected. But this is to attribute a most capricious intention to Parliament. There are three categories of subtenancy. First, if at all material times the head tenancy has been within the Acts, section 15 (3) plainly protects the subtenant. Secondly, at the other extreme, if the head tenancy has always been outside the Acts because of a high rateable value, the subtenant again is clearly protected, in this case by the combined effect of sections 15 (3) and 41. Thirdly, there is the middle category, where the head tenancy was formerly controlled by the Acts but was decontrolled by the Act of 1957. It is difficult to see why Parliament should wish to single out subtenants in this category for a loss of protection, but it becomes quite impossible to see this when it is realised that some of them are in fact protected. For the landlords' case is based on the tenant being one who received the transitional protection of the Fourth Schedule to the Act of 1957; yet, as paragraph 2 (1) shows, a tenant with a contractual tenancy of 15 months or more is outside these provisions. The landlords' argument thus involves treating the Act of 1957 as excluding subtenants from the Acts if (and only if) the head tenancies themselves were decontrolled but were either statutory tenancies or short contractual tenancies, and not contractual tenancies for 15 months or more; and no possible reason for such a discrimination has been or could be suggested.

The word "letting" in section 41 refers to the initial letting, and every statutory tenancy is founded initially on a letting. It would have been a singularly inept way of dealing with the "*Cow* "v. *Casey*"[7] problem to limit section 41 to subtenants of persons holding under contractual tenancies. [*Berkeley* v. *Papadoyannis*[8] and *Roe* v. *Russell*[9] were referred to on the right of a statutory tenant to sublet part.] The Act of 1957 only decontrolled certain types of houses and it is difficult to discern any parliamentary intention antagonistic to the protection of a subtenant of part of a house which as a whole is now decontrolled. Some five million houses are still controlled.

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[5] [1949] 1 K.B. 474.

[6] [1950] 2 K.B. 228; 66 T.L.R. (Pt. 1) 867; [1950] 1 All E.R. 577, C.A.

Section 15 (3) applies literally to the facts of the present case without need for section 41. Apart from the question of the effect of the transitional provisions, the head tenancy, being a statutory tenancy, would have come to an end automatically on the coming into force of the decontrolling provision without need for any notice (*Morrison* v. *Jacobs*[10] and *Dunnachie* v. *Urwin*[11]), and then section 15 (3) would have come into operation so that the subtenant would be brought into direct relationship with the head landlords.

It is said that difficulty arises because of the continued occupation by the head tenant under the transitional provisions, but a landlord can grant a reversionary lease interposing a third party between himself and his tenant without ousting the tenant. After the end of the statutory tenancy section 15 (3) puts the subtenant into direct relationship with the landlords, and then the new bundle of rights given for a limited time to the ex-tenant are interposed between the landlords and the subtenant. The schedule does not provide that the tenancy shall continue with modifications—the tenant is given a new right to retain possession which, though modelled on the previous tenancy, is nevertheless new. It is a right to occupy as if the Rent Acts had not ceased to apply to the premises, but it is not a mere enlargement of the old tenancy, whether statutory or contractual. The terms on which he can retain possession differ in several respects from those of a statutory tenant. [The illustrations referred to are sufficiently stated in the judgment of Pearce L.J.]

The Act of 1957 divides the properties to which it applies into three categories. The first is where the head tenancy was on July 6 a contractual tenancy with at least 15 months to run. In such a case the tenant did not get the benefit of transitional protection afforded by the schedule, but the premises would be decontrolled at the end of the contractual term and a subtenant of a part having a rateable value below the limits within which decontrol applied would be protected by the combined effect of sections 15 (3) and 41. Section 41 envisages a separate letting to the tenant; it notionally splits the superior tenancy but does not expel the head tenant from the part sublet by notionally substituting the subtenant. Nor does it affect the terms of the subletting. If, however, section 41 should be interpreted as notionally creating a separate letting direct to the subtenant of the part sublet, then there would be no need to bring in section 15 (3), and the subtenant would take over a completely new direct lease, the rent being arrived at by apportioning the rent payable by the head tenant. It is not clear what the other terms of the new interest would be. Section 15 (3) puts a subtenant into direct relationship with the landlord on the terms of the old subtenancy, including the old rent. Section 15 (3) was called in aid in *Cadogan* v. *Henthorne*,[12] a case which correctly construed section 41 and should be applied in this case. But, whether section 41 operates alone or with section 15 (3), it is clear that when the head tenancy ends the subtenant in this category of case is brought into direct relationship with the landlord and is protected. Secondly, where the head tenant had a contractual tenancy with less than 15 months to run at the material date, the head tenant gets the benefit of the transitional provisions. Finally, there is the case of a statutory tenant; he also gets the benefit of the transitional protection.

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[7] [1949] 1 K.B. 474.

[8] [1954] 2 Q.B. 149; [1954] 3 W.L.R. 23; [1954] 2 All E.R. 409, C.A.

[9] [1928] 2 K.B. 117; 44 T.L.R. 278, C.A.

[10] [1945] K.B. 577; 61 T.L.R. 550; [1945] 2 All E.R. 430, C.A.

[11] [1951] N.Z.L.R. 79.

Section 15 (3) operated when the head tenancy ended on July 6. Even if the tenant did not actually leave and a new tenancy is ultimately agreed on, the subtenant can claim the benefit of section 15 (3) and would get the benefit of a concurrent lease taking effect in reversion expectant on the determination of the tenant's interest: see Woodfall on Landlord and Tenant, 25th ed. (1954), p. 285, para. 704. Alternatively, it may be that the subtenant's interest remains dormant until the head tenancy has determined. There is no express reference to dormancy in the Act, but neither was there in section 12 (1) (*g*) of the Act of 1920, yet in *Moodie* v. *Hosegood*[13] the House of Lords, to make the Act work, held that an interest of the Probate judge had to be regarded as dormant until the widow's transmitted statutory tenancy ended. [*Knightsbridge Estates Trust Ltd.* v. *Deeley* [14] was referred to.]

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[12] [1957] 1 W.L.R. 1; [1956] 3 All E.R. 851.

[13] [1952] A.C. 61; [1951] 2 T.L.R. 456; [1951] 2 All E.R. 582, H.L.

Priday in reply. The scheduled rights of a statutory tenant after decontrol continue his statutory tenancy with certain modifications. These provisions are merely variations which do not result in a termination of the statutory tenancy and the creation of something new.

American Economic Laundry Ltd. v. *Little* [15] dealt with special circumstances far removed from these. *Moodie* v. *Hosegood* [16] was concerned with a conflict between two Acts of Parliament, but there is no conflict here if the tenant's interest continues.

The first defendant did not appear and was not represented.

Cur. adv. vult.

February 12. PEARCE L.J., reading the judgment of the court, stated the facts and said: The question before us is whether the judge was right in holding that the second defendant was protected by other Acts as subtenant, and in refusing to make an order against her for possession.

The effect of section 11 of the Rent Act, 1957, was to decontrol the whole house but to allow the tenant to continue in possession for a certain transitional period. The house therefore became decontrolled on July 6, 1957 (see section 27 (2)) and thereafter the tenant was only protected in a transitional status in accordance with Schedule 4.

Section 11 (1) of the Rent Act, 1957, reads: "The Rent Acts "shall not apply to any dwelling-house the rateable value of "which on November 7, 1956, exceeded, in the Metropolitan "Police District or the City of London £40, elsewhere in England "or Wales £30, and in Scotland £40."

Section 11 (7) reads: "The transitional provisions contained "in Schedule 4 to this Act shall have effect in relation to "dwelling-houses which cease to be subject to control by virtue "of subsection (1) or (3) of this section; . . ."

Paragraphs 1 and 2 (1) of Schedule 4 to the Act are as follows: "1. In this Schedule 'the time of decontrol' means the time "at which the Rent Acts cease to apply to a dwelling-house by

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[14] [1950] 2 K.B. 228.

[15] [1951] 1 K.B. 400; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186, C.A.

[16] [1952] A.C. 61.

"virtue of subsection (1) or (3) of section 11 of this Act. 2. (1) "Where immediately before the time of decontrol the dwelling-"house was the subject of a statutory tenancy or of a controlled "tenancy which would or might come to an end within 15 "months of that time by effluxion of time or notice to quit, the "tenant under that tenancy shall be entitled until the date "hereinafter mentioned, and subject to the following provisions "of this Schedule, to retain possession of the dwelling-house in "the like circumstances, to the like extent and subject to the like "provisions (including in particular provisions as to recovery of "possession by the landlord) as if the Rent Acts had not ceased "to apply to the dwelling-house."

The landlords served on the first defendant the appropriate notice expiring on October 6, 1958, and as from that date they became entitled to an order for possession against her.

At common law the subtenant would cease to have any right to possession when the tenant's rights determined. Section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided certain protection for the subtenant; but this protection was inapplicable where the head tenancy was not protected by the Acts: *Cow* v. *Casey*.[1] Accordingly, section 41 was inserted into the Housing Repairs and Rents Act, 1954. Its effect was notionally to carve out of the unprotected larger tenancy the smaller part that was sublet, so that the subtenancies might be protected. It is conceded that these are the only sections that could avail the subtenant here and the question is whether she is protected by either of those sections or by their joint effect.

[His Lordship read section 15 (3) and section 41 and went on:] Each side relied on an argument as to the general intention of the legislature. For the landlords it was said that since the Rent Act, 1957, was a decontrolling Act and said no word about the protection of subtenants, it appeared that subtenants in houses decontrolled by the Act were not intended to have any protection. For the subtenant it was argued (and as it seems to us with greater force) that it was hard to believe that the legislature while specifically protecting subtenants where the head tenancy remained controlled (section 15 (3) of the Act of 1920) and subtenants where the head lease was never controlled (section 41 of the Housing Act, 1954) should treat as a special unprotected class those subtenants whose head tenancy happened to be in the class decontrolled by the Act of 1957, namely, where the premises were of a rateable value between £100 and £40. And not all who were in that special class would be unprotected. For some might be subtenants whose head tenant's interest was a tenancy with more than 15 months to run; in which case it was conceded that the head tenant received no transitional protection under Schedule 4 and when the head tenancy determined the subtenants would still be protected. Anomalous as some of the results of the Rent Acts have proved to be, it is difficult to believe that such an arbitrary anomaly as that was intended. We approach the matter on the footing that it is unlikely that such a result was intended, and that it is far more likely that the legislature omitted from the Act of 1957 any clause for the protection of subtenants in the belief that existing enactments already sufficed for that purpose. Nevertheless if such a result is of necessity produced by terms of the various Acts, general intention is irrelevant.

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[1] [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197, C.A.

If one leaves out of account for the moment the transitional period, the effect of the decontrol of this house in July, 1957, was to destroy the statutory tenancy immediately. This was so decided in *Dunnachie* v. *Urwin*,[2] a case in New Zealand where statutes similar to our Rent Acts are in force. Adams J. there said[3]: "The evidence shows that the rights of the defendant "after the determination of the lease in December, 1949, rested "wholly on the statute, there being no ground for holding that any "new tenancy was created; and I think it is clear that, when he "ceased to be entitled to the protection of the statute, he was "relegated to the same position as would have been his on the "termination of the lease if no such statute had been in force." If we may say so respectfully, that decision was clearly right.

The statutory tenancy having been thus determined, section 15 (3) of the Act of 1920, according to the subtenant's argument, would apply to protect him since all its requirements are fulfilled. "The interest of a tenant to which the Act applies is deter- "mined" and the subtenant to whom a part of the premises has been lawfully sublet is deemed to become tenant of the landlord on the same terms as those of his subtenancy.

But the landlords argue that the transitional tenancy makes all the difference. By reason of it there is never any moment at which "the interest" of a tenant to which the Act applies is determined, since the interest is not determined until the end of the transitional period, and by then the Act no longer applies since it ceased to apply at the beginning of the transitional period. Therefore both conditions are not fulfilled simultaneously as section 15 (3) of the Act of 1920 requires.

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[2] [1951] N.Z.L.R. 79.

[3] Ibid. 81.

The subtenant's argument (which the judge accepted) is that the tenant's interest was in fact determined at the beginning of the transitional period, whereupon section 15 (3) of the Act of 1920 came into operation; and that the tenant's transitional rights thereafter, although they enabled him to "retain possession of "the dwelling-house in the like circumstances to the like extent "and subject to the like provisions," were not "the interest of "the tenant" as it had been heretofore.

Mr. Priday, for the landlords, has argued that the statutory tenancy under the Rent Acts was prolonged by Schedule 4 for the transitional period. But the schedule, deliberately as it seems, avoids so doing. It gives him in place of it "a right "to retain possession" which is so described throughout the schedule. The former tenant if asked his status during the transitional period could no longer truthfully describe himself as a statutory tenant but only as a former statutory tenant who had a right to remain for not less than 15 months until the expiry of a properly served notice. Moreover, although his right to remain is defined as "to the like extent and subject to the like provisions" as if the Rent Act still applied, it differs from his rights as a statutory tenant in various respects which Mr. Megarry for the subtenant pointed out to us. He may pay a different rent since his rent cannot (except as regards an increase in rates) be increased as can that of a statutory tenant (para. 3). He is, unlike a statutory tenant, liable to lose his rights and to be dispossessed on notice expiring after 15 months from the commencement of his transitional rights (para. 2 (2)). His right to remain apparently does not cease to exist, as do the rights of a statutory tenant, on the grant of a tenancy unless it be for three years or more (para. 4). He has rights of compensation (para. 5) which are not possessed by a statutory tenant. And finally rights are expressly given by paragraph 14 to his widow and others corresponding to those given to a tenant under section 12 (1) (*g*) of the Rent Act, 1920; this would be unnecessary if he remained a statutory tenant.

Whether this alteration in the terms of the head tenant's occupation amounts to a determination for the purposes of section 15 (3) or is more properly regarded as a variation not amounting to determination we need not finally decide for reasons which will appear. Assuming it does amount to a determination, the problem arises as to how, if at all, the tenancy between the landlord and the subtenant which is thereby deemed to exist can exist during the transitional period of the former tenant. Mr. Megarry says that it can be treated as the grant of a concurrent lease to take effect in reversion expectant on the tenant's transitional "period of grace": see Woodfall on Landlord and Tenant, 25th ed. (1954), p. 285, para. 704. He also submits that the case is analogous to the decision in the House of Lords in *Moodie* v. *Hosegood*,[4] where it was held that the right of the deceased husband's estate to a contractual tenancy of controlled premises could be suspended or dormant until the widow's statutory tenancy (section 12 (1) (*g*) of the Rent Act, 1920) came to an end.

There is, we think, a further difficulty in applying section 15 (3) to this case without the aid of section 41 of the Housing Repairs and Rents Act, 1954. The interest of a tenant is determined simply because the Act of 1920 ceases to apply to the house. How, then, can it be said that this is a case where "the interest of a tenant of a dwelling-house to which this Act "applies is determined?" For it is difficult to see how both those conditions can exist simultaneously in this case. At one moment of time it is a case where the interest of a tenant of a dwelling-house to which this Act applies is *not* determined. At a later moment it becomes a case where the interest of a tenant of a dwelling-house to which this Act does *not* apply is determined. Can it be said that there is any stage at which the two necessary conditions co-exist? However, it is not necessary finally to decide this point because we think that, when combined with section 41, section 15 (3) clearly protects the subtenant.

It is contended for the landlords that section 41 can have no application to this case since it only applies to contractual lettings and not to statutory tenancies. We cannot accept that argument. The section deals with the position where a superior tenancy was uncontrolled and therefore the subtenant was unprotected (as in the case of *Cow* v. *Casey* [5]). But the words are general, and are not confined to a situation where the superior letting has never been a controlled dwelling-house. Provided that the superior letting is of a dwelling-house which at that moment is not controlled, the section applies. It seems irrational to suppose

[4] [1952] A.C. 61; [1951] 2 T.L.R. 456; [1951] 2 All E.R. 582, H.L.

[5] [1949] 1 K.B. 474.

that subtenants should lose the benefit of its protection merely because at an earlier period of time the head tenancy had ceased to be contractual and had been statutory. The words "let" and "sublet" are used without differentiation. The word "sublet" is clearly from the terms of the section intended to cover statutory as well as contractual subletting. It would be wrong to read into the word "let" an artificial connotation that limits it to contractual letting while reading the word "sublet" in a wider sense that includes a statutory tenancy. Moreover, the words "sublet" and "let" are used throughout the section in the past tense. At some time every letting or subletting has been contractual; but the section does not exclude those that have at a later stage become statutory.

In our opinion, section 41 does apply to the facts of this case. "A dwelling-house to which the Act . . . applies" (namely, the ground floor) "forms part of premises, not being such a dwelling-"house (namely, the whole house now decontrolled by the Act) "which have been let as a whole on a superior letting" (namely, the original letting to the tenant in this case). The section then provides that the operation of the Rent Acts shall be the same as if the landlords, instead of letting the house as a whole, had let the ground floor to the tenant under one letting and the rest under another, with the result that the ground floor comes within the ambit of the Act, and section 15 (3) comes into operation and deems the subtenant to become the tenant of the landlord. This is in accordance with the interpretation of the subject by Hallett J. in *Cadogan* v. *Henthorne*,[6] and we accept his reasoning.

In our opinion the county court judge came to a correct conclusion and the appeal fails.

Appeal dismissed with costs. Leave to appeal to House of Lords refused.

Solicitors: *Pennington & Son; Compton & Co.*

E. D.

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[6] [1957] 1 W.L.R. 1; [1956] 3 All E.R. 851.

LOUIS DREYFUS & CIE. *v.* PARNASO CIA. NAVIERA S.A.

C. A.

1960
Feb. 19,
22, 23.

Sellers,
Ormerod and
Harman L.JJ.

[1958 L. No. 1958.]

Shipping—Charterparty—Cargo—"Full and complete cargo"—Declaration of quantity—"Quantity in owners' option to be declared by the "master"—Declaration by master of approximate quantity—Vessel unable to load amount declared—Whether owners in breach of contract—Limits of tolerance of "approximate" or "about"—Effect in law of master's declaration.

Contract—Construction—Ut res magis valeat quam pereat—Promise to give notice of capacity of ship—Notice giving approximate capacity—Whether binding subject to de minimis rule.

Election or Option—Effect of exercise—Charterparty—Notice of capacity of ship.

Words and Phrases—"About."

Ships' Names—Dominator.

A charterparty in the "Gencon" form, dated November 4, 1957, for a single voyage, provided by clause 1 that the *S.S. Dominator* was to proceed to a named port "and there load a full and complete "cargo of not more than 10,450 tons and not less than 8,550 tons "wheat in bulk, quantity in owners' option, to be declared by the "master in writing on commencement of loading . . ."

On arrival at the port the master of the vessel wrote to the charterers that "the approximative [*sic*] cargo to the holds will "be . . . Total 10,400 tons." The charterers brought that quantity of cargo to the port, but in fact the master had over-estimated the capacity of the vessel and she loaded 331 long tons short. As a result of the vessel's inability to load the whole of the cargo the charterers incurred expenses which they sought to recover from the shipowners:—

Held, that the option in clause 1 of the charterparty did not consist of words of expectation only but was a true option which permitted the shipowners who exercised it to limit the primary meaning of "full and complete cargo" such that, once the declaration was made, the quantity declared by the master of "approximative . . . 10,400 tons" became substituted for the wide range of maximum and minimum quantities in the charterparty and became a "full and complete cargo" within clause 1. But the word "approximative"—which was to be construed as meaning "about"—must be given its full effect in the contract as a word which allowed a limit of tolerance greater than that allowed under the de minimis rule and which was wide enough to cover the deficiency of some 3·18 per cent. by which the quantity actually loaded fell short of 10,400 tons. Accordingly, the charterers having failed to object to that form of declaration, the shipowners were not liable for any breach of contract (post, pp. 55, 58, 59).

Morris v. *Levison* (1876) 1 C.P.D. 155 and *The Resolven* (1892) 9 T.L.R. 75 applied.

Decision of Diplock J. [1959] 1 Q.B. 498; [1959] 2 W.L.R. 405; [1959] 1 All E.R. 502 reversed on this point.

BIBL. LONDIN UNIV.

APPEAL from Diplock J.

By a printed charterparty in the form known as “Gencon,” recommended by the Documentary Council of the Baltic and White Sea Conference, dated November 4, 1957, made between the plaintiffs, Louis Dreyfus & Cie., as charterers, and the defendants, Parnaso Cia. Naviera S.A., as owners of the *S.S. Dominator*, it was provided, by clause 1, that the vessel was to “proceed to La Pallice . . . and there load a full and com“plete cargo of not more than 10,450 tons and not less than “8,550 tons wheat in bulk, quantity in owners' option, to be “declared by the master in writing on commencement of loading “. . . which the charterers bind themselves to ship, and being “so loaded the vessel shall proceed to Karachi . . . and there “deliver the cargo on being paid freight.”

By clause 2 of the charterparty “Owners are to be responsible “for loss of or damage to the goods or for delay in delivery of “the goods only in case the loss, damage or delay has been “caused by the improper or negligent stowage of the goods . . . “or by personal want of due diligence on the part of the owners “or their manager to make the vessel in all respects seaworthy “and to secure that she is properly manned, equipped and sup“plied or by the personal act or default of the owners or their “manager.

“And the owners are responsible for no loss or damage or “delay arising from any other cause whatsoever, even from the “neglect or default of the captain or crew or some other person “. . . for whose acts they would, but for this clause, be respon“sible, or from unseaworthiness, of the vessel on loading, or “commencement of the voyage or at any time whatsoever.”

The third paragraph of clause 2 in the printed form provided: “Damage caused by contact with or leakage, smell or evaporation “from other goods or by the inflammable or explosive nature “or insufficient package of other goods not to be considered as “caused by improper or negligent stowage, even if in fact so “caused” but that paragraph had been deleted and the following words inserted in typescript “Owners to be responsible for “number of bags signed for in bills of lading.”

Clause 16 provided that the charterers were “to supply a “sufficient quantity of cargo in bags for safe stowage as required “by the master, not exceeding 7½ per cent. of the entire cargo, “such quantity to be declared by the master in writing on “commencement of loading.”

The vessel arrived at La Pallice on November 23, 1957, when, on the request of the charterers' agents for an immediate declaration in accordance with the provisions of clause 1 of the charterparty, the master, after making calculations, wrote to the agents in the following terms:

"To the shippers, La Pallice.

"I . . . the Master of the steamer *Dominator*, I have to "notify you that I shall require 300 tons wheat in bags for "loading and the approximative [*sic*] cargo to the holds will be "as follows:—

"No. 1 hold 1,600 long tons.
" 2 hold 3,000 ditto.
" 3 hold 2,000 ditto.
" 4 hold 2,150 ditto.
" 5 hold 1,650 ditto.
"Total:—10,400 tons."

The master had inadvertently calculated the quantity of cargo which the vessel could load on the basis of summer marks instead of winter marks on which the vessel was sailing, so that she was unable to load the total of 10,400 tons and in fact loaded 331 long tons short. The charterers had brought the whole of the cargo to La Pallice and as a result of the inability of the vessel to load the 331 long tons incurred expenses which were agreed at £155 8s. 2d.

The charterers withheld that amount from the freight and alleging that, upon the declaration by the master, the shipowners became obliged to load and/or warranted that the vessel was capable of loading 10,400 tons, claimed a declaration, inter alia. (a) that by reason of the inability of the vessel safely to load the 331 long tons the shipowners were in breach of the charterparty and (b) that the damages suffered by reason of that breach amounted to £155 8s. 2d.

The shipowners denied that they were under any liability to the charterers and alleged that had the vessel been able to take 10,400 tons the 331 long tons would have been loaded and that she had in fact sailed from La Pallice with a full and complete cargo. They denied that the notification by the master to the charterers had the effect in law for which the charterers contended or any effect in law. Further or alternatively they relied on clause 2 of the charterparty as exempting them from any liability to the charterers.

Diplock J.[1] held on clause 1 that once the shipowners had exercised their option through the master of declaring the quantity of cargo to be carried, the quantity so declared was to be deemed a full and complete cargo for the purposes of the charterparty; that the word "approximative" in the master's notice, which purported to be given under the clause and therefore to be of an exact quantity, referred only to those limits of tolerance imported into such commercial contracts by the de minimis rule, so that the notice was a good declaration under clause 1; and that, accordingly, the quantity of cargo to be loaded under the contract was 10,400 tons; and he granted declarations accordingly to the charterers.

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[1] [1959] 1 Q.B. 498; [1959] 2 W.L.R. 405; [1959] 1 All E.R. 502.

The shipowners appealed against that part of the decision and also against the trial judge's construction of clause 2 of the charterparty—the exceptions clause—but on the hearing of the appeal the court intimated that they would allow the appeal in the shipowners' favour without considering the questions raised on the exceptions clause.

A. A. Mocatta Q.C. and *Michael Kerr* for the shipowners. First, the important words in clause 1 of the charterparty are "a "full and complete cargo"; the declaration by the master had no legal effect but was merely an intimation for the convenience of the parties of what he thought the ship could load. The declaration need not have been given at all, and in that event the obligation on the charterers would be to load a full and complete cargo within the limits specified in the charter so as to bring the vessel down to the relevant loading line. The declaration did not amount to an election or a warranty which thereafter bound the parties, breach of which could make the owners liable in damages: see *Chandris* v. *Louis Dreyfus & Co.*,[2] where words not materially different from these were used, and MacKinnon J.[3] said, albeit obiter, that if the master declared a certain figure he would not be varying the terms of the charterparty.

Alternatively, if the declaration amounted to a warranty, its effect was to estop the owners from saying that the upper limit of a full and complete cargo was in excess of the figure declared for, so that they would not be able to ask for more, even if the ship could carry more.

Further, if the declaration has a contractual effect, then the deficiency of 3·18 per cent. below the declared quantity is covered by the master's word "approximative," which means "about" or " thereabouts ": see *Morris* v. *Levison*, *per* Brett J.,[4] and *The Resolven*,[5] where 3 per cent. and 5 per cent. respectively were held to be within the tolerance of " about " and " thereabouts."

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[2] (1934) 50 Ll.L.Rep. 141.

[3] Ibid. 145.

Secondly, if there was a breach of contract under clause 1, the owners are exempt from liability under the exceptions clause, clause 2—a printed clause which has appeared in the " Gencon " form of charterparty since 1922. It had never been construed until Diplock J.[6] said in the present case that it was ambiguous, and he has construed it by reference to deleted words. In *S.S. Istros* (*Owners*) v. *F. W. Dahlstroem & Co.* Wright J.[7] held that that clause covered an express warranty.

[HARMAN L.J. Those responsible for the " Gencon " form of charter should not continue to put " Recommended " at the top of it. It is a ghastly document.]

[SELLERS L.J. It may be possible to decide this case without considering the exceptions clause. It is certainly very obscure.]

The exceptions clause is an important point of general interest, though if the owners succeed on the first point of dispute anything said by the court on the exceptions clause would be obiter.

R. A. MacCrindle for the charterers. Five types of obligation may arise where the words " load a full and complete cargo " are used. [*Morris* v. *Levison*,[8] *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[9] and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*[10] were referred to.] In the present type of case the obligation under clause 1 is that the owners shall carry a notional full and complete cargo with specified maximum and minimum limits. The addition of " quantity in owners' option " has the effect that once the declaration is made the quantity declared, provided it is within the maximum/minimum bracket, becomes " a full and complete cargo," that is, the precise amount which the owners are obliged to carry, even if that deprives the charterers of the right to require the loading of a true full and complete cargo. The master is the one person who can calculate precisely at the moment when he makes the declaration, and this master was precise, save that he made the mistake as to winter marks and thereby caused the charterers to suffer damage. *Chandris* v. *Louis Dreyfus & Co.*[11] is distinguishable, for there the master was declaring something outside the contractual limits.

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[4] (1876) 1 C.P.D. 155, 158.

[5] (1892) 9 T.L.R. 75.

[6] [1959] 1 Q.B. 498, 512–515.

[7] [1931] 1 K.B. 247, 251–252.

[8] (1876) 1 C.P.D. 155.

[9] (1897) 2 Com.Cas. 173.

[10] [1910] 1 K.B. 627; 26 T.L.R. 301.

[11] 50 Ll.L.Rep. 141, 145.

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Further, the option must be exercised. It has been solemnly written into this charterparty by the parties and is in imperative terms. If the master did not exercise the option the owners would be in breach of their contract, and the exercise of the option substitutes a precise for an imprecise warranty.

[HARMAN L.J. If the owners are obliged to exercise an option given to them it becomes a contradiction in terms.]

In a business document which gives advantages to both parties there is nothing inconsistent in describing something as an option and attaching to it the lawful duty to exercise it. The words "to be declared" are imperative in mood, and are words of obligation. There is an obligation to declare; what is to be declared is, within stated limits, optional. The provision as to the option is not for the charterers' benefit, but if they suffer damage through a breach of it they may have a right of action. If the owners are right in submitting that the declaration has no legal effect, then in every contract of this kind owners would require their masters to declare the maximum upper limit of the bracket because they could not lose and might gain by it.

As to the effect of the word "approximative," the only universal test in construing words of uncertain latitude such as "approximately" or "about" is that of context and surrounding circumstances: *Shipton, Anderson & Co.* v. *Weil Bros. & Co.*, *per* Lush J.[12] A latitude of about 3 per cent. might be allowed where owners contract to carry "about" a given quantity on a future date; but where the obligation arises under a contract like this, and the master at the time of making the declaration has all the data for calculating precisely, there is no room for any latitude beyond that which is always allowed in commercial contracts under the de minimis rule. The error of 3·18 per cent. which occurred here is a variation of substance amounting to breach of contract. One should construe the master's declaration as a valid contractual declaration (as it purported to be, and was accepted as) if at all possible. This can be done by permitting the word "approximative" the latitude covered by the de minimis rule, or by reading in, in relation to the quantities mentioned for each hold as opposed to the figure for the total cargo. To decide that the master could declare any quantity he liked (provided it was within the maximum and minimum bracket) without any correlative obligation would do violence to the language of this charterparty.

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[12] [1912] 1 K.B. 574; 28 T.L.R. 269.

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Mocatta Q.C. in reply. The master's declaration, containing the word "approximative," was never challenged as bad, and must now be accepted as a valid declaration.

Sellers L.J. This is a claim by way of declarations involving no more than £155, and it can be answered in favour of the appellants, in my judgment, on one of the three grounds on which they rely, namely, that the shipowners took on board approximately 10,400 tons, which was, in fact, a full and complete cargo. If they did that, they were under no obligation to do more on any view of this case which has been advanced before us. [His Lordship stated the relevant facts, set out above, and continued:]

Diplock J. held that, once the master had declared the quantity to be carried, the quantity of cargo which the ship was bound to load and the charterers were bound to ship was the quantity so declared. The judge then stated that "approximative" is a word which has no defined limits of tolerance and he construed the declaration as if it was for 10,400 tons with an obligation limited only by those limits of tolerance which the de minimis rule imports. The master was a Greek, and when he said "approximative" he was, in my view, saying the same thing in respect of quantity as the agents had said in a letter of November 8: "it is anticipated the vessel will lift a cargo of about 10,400 long "tons."

I would regard 331 tons deficiency in a cargo of 10,400 tons, a deficiency of just over 3 per cent., as fulfilling the obligation to ship about 10,400 tons: see *Morris* v. *Levison*[1] and *The Resolven.*[2] In the absence of any trade evidence on the matter, it is, in my opinion, within a reasonable commercial margin in respect of such a cargo.

Mr. MacCrindle argued strenuously that a declaration by the master at the commencement of loading could be and was intended to be precise, and that to state "about" was not in accordance with the requirement. The declaration was, however, accepted without complaint, and I do not think it should be read by either party in assessing their rights and obligations as if "approximative" was not there. It is still a statement of quantity much narrower in its latitudes than the wide range in the charterparty.

That is sufficient to decide this case in favour of the appellants. But Mr. Mocatta invited us to go further and to hold that the declaration had not the effect alleged by the charterers and found by the judge, that whatever quantity the master declared within the limits specified in the charterparty was to be deemed to be a full and complete cargo for the purposes of the charterparty. He submitted that such a declaration by the master could not be interpreted so as to alter the contractual liability under the charterparty, and was merely an intimation to the charterers as a matter of convenience to give them a closer idea of the anticipated cargo required within the very wide limits of 8,550 to 10,450 tons. The alternative submission was that the declared quantity became the maximum quantity which the ship could demand in substitution for the charterparty maximum of 10,450 tons. As the charterers were, apart from the declaration, not only obliged but entitled to load a full and complete cargo up to 10,450 tons, then, if the master was able to declare a lower quantity which became binding whether the ship were fully loaded or not, he could, in variance of the charterparty, deprive the charterers of their right to load a full cargo if they wished to do so. If the declared quantity was to be deemed a full and complete cargo, then, it was said, no meaning remains in the words "and there load a full and "complete cargo."

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[1] (1876) 1 C.P.D. 155.

[2] (1892) 9 T.L.R. 75.

These are substantial arguments, and it is perhaps surprising that charterers are prepared to contend that the phrase "quantity "in owners' option to be declared by the master in writing on "commencement of loading" does make drastic inroads on what would without it have been their rights.

Without the declaration, the charterparty would require the charterers to load and the shipowners to receive a "full and "complete cargo" within the limits specified, and, as the judge states, if that were all, the obligation of the parties would have been that the owners warranted a minimum capacity of 8,550 tons before the vessel was fully loaded, and the charterers were under an obligation to provide a full and complete cargo up to 10,450 tons (if the vessel were capable of holding so much), but under no obligation to provide more even if there remained capacity in the ship to take more: see *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[3] and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*[4]

Notwithstanding the force of Mr. Mocatta's submission, and the reliance he placed on the observations of a very experienced commercial judge, MacKinnon J., in *Chandris* v. *Louis Dreyfus*

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[3] (1897) 2 Com.Cas. 173.

[4] [1910] 1 K.B. 627; 26 T.L.R. 301.

& Co.,[5] cited by the judge, I have come to the conclusion that once the declaration was properly made the quantity stated therein became substituted for the wide range of maximum and minimum quantities stipulated in the charterparty and established the quantity to be loaded. I doubt whether it is right or necessary to say that such a quantity is deemed to be a full and complete cargo, although that might often be the effect. It becomes the maximum which the shipper is required to load, but I am inclined to think that, in this case and with this declaration, if the vessel had not been fully laden with 10,400 tons, the charterers could have required the acceptance of a similar margin, say 3 per cent., above that quantity, relying on the provision that she was to take a full and complete cargo limited only by the declared quantity; that is, the shipowners could not have relied on the minimum quantity of his declaration.

At first sight it seems an unlikely option for a charterer to grant or accept in the charterparty, as it would appear more of a detriment to the shipper than a benefit to the shipowner. I felt doubt at one time whether the option could benefit the shipowner to whom it was given; but if it served his purpose he could by the declaration of the master take less cargo than a full and complete cargo, and thereby speed the dispatch of his ship from the loading port, or leave room for the intake of cheap bunkers and stores, for instance, subsequently to loading the charterparty cargo. The exercise of the option, unless it is a precise calculation of what cargo will bring the vessel down to her load line, would operate, it would seem, to the prejudice of the charterer, as the master (to whom the stowage of a cargo may often be an uncertain factor) would tend to stipulate for less than a full cargo to be on the safe side against such a claim as has arisen here. The benefit to the charterer, it is said, is that he is informed of the precise amount of cargo he will be required to ship, and can make arrangements accordingly with the minimum of expense, as he would not provide surplus cargo. The master in the present case no doubt intended to be on the safe side, but he erred in calculating on a summer load line when the ship had shortly before changed to winter marks. As it happened, the ship just took the minimum of the amount he stipulated as I have felt it ought to be interpreted.

Before Diplock J. the shipowners had also relied on an exceptions clause in the charterparty. This point had been found against them and the finding was subject to appeal, but it became unnecessary in the view which the court took of the declaration, and it was not argued before us.

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[5] (1934) 50 Ll.L.Rep. 141.

I would allow the appeal and refuse the declarations which the judge gave.

Ormerod L.J. I also would allow this appeal. On the question of the construction of the first clause of the charterparty, I am in full agreement with the view expressed by my Lord, and would add nothing. I only add a few words on the meaning to be put on the captain's declaration, as we are differing from the judge on that question.

The judge took the view that it was right for him to construe the declaration as one " complying with the terms of the contract, " if such a construction is open to me." Such a declaration, in his view, was one which purported to declare an exact quantity within such limits of tolerance as would come within the de minimis rule. He then came to the conclusion that, as the word " approximative " was one without any defined limits of tolerance, it should be so construed as referring only to such tolerance, and held, therefore, that the notice was a good notice. Whether a declaration allowing a greater limit of tolerance than that suggested by the judge would be a good declaration under this charterparty is a question on which I feel some doubt. But the charterers accepted this declaration as a good declaration, and it is on that basis that I would approach this question.

I find it difficult to accept the conclusion of the judge that the word " approximative " gives to the parties no more tolerance than would the de minimis rule. To do so means that the word was inserted into the declaration for no purpose whatsoever. It is true that the master of the ship was Greek, and his use of the word " approximative " is some indication of his lack of command of English. But that does not seem to be sufficient reason for failing to give effect to the language of the document as it is before us. In my judgment, " approximative " refers to something more than the tolerance suggested by the judge. How much more depends on the surrounding circumstances. The ship was unable to load by 331 tons the 10,400 tons referred to in the notice, which is a difference of 3·18 per cent. In the circumstances of this case, this comes, in my judgment, within the tolerance imported into the declaration by the word " approximative." I would, therefore, allow the appeal on this ground.

HARMAN L.J. I agree. I do not feel any doubt that the judge rightly construed the words of the charterparty, and that all of them form part of the contract, that is to say, that the option phrase does not consist merely of "words of expectation," the phrase rejected in *Morris* v. *Levison.*[6] What, then, do these words, regarded, of course, in the light of the surrounding circumstances, mean? The meaning of the words preceding the reference to the option is not in doubt, having regard to the authorities, *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[7] and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*,[8] cited by my Lord. They are a warranty by the owners that not less than 8,550 tons shall be carried. They give the shipper the right to load up to the higher figure, if the vessel will take so much, but no more, even though she could carry more. Thus an inroad is made on the primary meaning of "full and complete "cargo." The option that follows is an option to the owners by their agent, the master, to put a further limit on this same right by declaring the quantity. This declaration need not, in my judgment, be made. It is truly an option. But if the option be exercised, of course within the limits set by the document, then the figure declared by the master must be read into the contract, and will constitute, as between the parties, a full and complete cargo. The drafting is not elegant. It would be better expressed by some such words as "such tonnage not more than about 10,450 "tons, nor less than about 8,550 tons, as the master shall in "writing declare before loading starts, this to be treated as a "full and complete cargo." I think, however, the meaning is tolerably clear.

The next question is of the meaning of the notice. The judge thought that "quantity" in the option must be construed as "exact quantity," that, ut res magis valeat, the words in the notice must be made to comply, and that the quantity should be read as 10,400 tons precisely, notwithstanding the word "approximative." He therefore felt bound to give to the latter word an unnatural meaning and treat it as a reference to such trifling differences as would be implied in its absence under the doctrine of de minimis. For myself I see no necessity to desert the cardinal principle applicable to the construction of all documents, namely, to give its natural meaning to every word, if possible. I think "approximative" must be given its natural

[6] 1 C.P.D. 155.

[7] 2 Com.Cas. 173.

[8] [1910] 1 K.B. 627.

meaning of "about" or "more or less," and that whatever tolerance is appropriate to that expression becomes no less a part of the contract than the reference to 10,400. This, of course, works both ways. If the ship could have carried more, then the shippers could have asked for the excess; if less (as proved to be the case) then they must be content with less. Both sides appear to have assumed that the quantity can be well declared by such words as "10,400 more or less," and I think that is right. But if it is wrong, the charterers should have objected at the time and insisted on a more exact definition.

Alternatively, the option was never exercised at all, and in that case there was no breach because a full and complete cargo was in fact loaded.

It remains to consider whether the deficiency in carrying capacity, some 3·18 per cent., leaves the quantity within the tolerance indicated. I think it does. It is not so great a difference as alters the obligation so substantially as to make it a different bargain. I would conclude that there was no breach of contract.

Appeal allowed.
Judgment for the shipowners on claim and counterclaim, with costs in Court of Appeal and below.
Leave to charterers to appeal to House of Lords refused.

Solicitors: *Holman, Fenwick & Willan; Richards, Butler & Co.*

M. M. H.

1960
Feb. 25.
McNair J.

JOY MUSIC LTD. *v.* SUNDAY PICTORIAL NEWSPAPERS (1920) LTD.

[1957 J. No. 6328.]

Copyright—Infringement—Literary work—Parody—Words of popular song—Whether reproduction of substantial part of original work—Copyright Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 74), *s.* 49 (1).

A special feature article in a newspaper supporting activities of H.R.H. Prince Philip which had been criticised in certain quarters contained a parody of a popular song entitled "Rock-a-Billy." The parody concerned the same subject-matter as the article, was described as the writer's version of the song and acknowledgment was made to the plaintiffs, music publishers, in whom the copyright of the song was vested. The only similarity between the wording of the parody and of the original song was in the use of the words "Rock-a-Philip, rock," which were repeated in the chorus of the parody in the same way that the words "Rock-a-Billy, rock" were used in the chorus of the song.

The plaintiffs sought, inter alia, an injunction to restrain the defendants, the printers and publishers of the newspaper, from publishing the parody on the grounds that it was a reproduction of a substantial part of the original work to which they had not consented, which constituted an infringement of their copyright:—

Held, (1) that in considering whether a parody of a literary work constituted an infringement of the copyright in that work the main test to be applied was whether the writer had bestowed such mental labour upon the material he had taken and had subjected it to such revision and alteration so as to produce an original work.

(2) That applying that test to the present case, although the parody had its origin in the song "Rock-a-Billy," it had been produced by sufficient independent new work to be in itself not a reproduction of the words of the original song but a new original work derived therefrom; and, accordingly, as it was not a reproduction of a substantial part of the original work within the meaning of section 49 (1) of the Copyright Act, 1956,[1] there was no infringement and the action would be dismissed.

Dictum of Younger J. in *Glyn* v. *Weston Feature Film Co.* [1916] 1 Ch. 261, 268; 32 T.L.R. 235 applied.

ACTION.

The following statement of facts is taken substantially from the judgment. The plaintiffs, Joy Music Ltd., a company incorporated in Great Britain, were the owners by assignment of the copyright in Great Britain in the words and music of a song entitled "Rock-a-Billy," which had been published both in record and in sheet music form. The song had first been published in Great Britain in April, 1957, was extremely popular, reaching its zenith as a hit song in May, 1957. It was still popular in August, 1957, the material time for the purposes of the present action. The sheet music described the title of the song as "Rock-a-"Billy," stated that it was to be played in "solid rock," and set out the melody to which it was to be played. The song started with a chorus of four lines, which were as follows:

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[1] Copyright Act, 1956, s. 1: "(1) "In this Act 'copyright' in relation "to a work . . . means the exclusive "right . . . to do, and to authorise "other persons to do, certain acts in "relation to that work . . . (2) . . . "the copyright in a work is infringed "by any person who, not being the "owner of the copyright, and without "the licence of the owner thereof, "does, or authorises another person "to do, any of the . . . acts in rela-"tion to the work . . ."

S. 2: ". . . (5) The acts restricted "by the copyright in a literary . . . "work are—(*a*) reproducing the work "in any material form; . . ."

S. 49: "(1) Except in so far as "the context otherwise requires, any "reference in this Act to the doing "of an act in relation to a work . . . "shall be taken to include a reference "to the doing of that act in relation "to . . . a substantial part thereof, and "any reference to a reproduction . . . "shall be taken to include a reference "to a reproduction . . . of a substan-"tial part of the work . . ."

"Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock,
"Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock,
"Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock,
"Rock-a-Billy, Rock-a-Billy, Rock, Rock."

That chorus followed each of four verses, one of which was as follows:

"Some people think it came from Tennessee
"Then it spread on out to the lone prairie
"It's a 'Hill Billy Rock' and a Fiddle-dee-dee
"Turns me inside out, Gimme some."

The other verses were of a similar character and were not material to the present action.

On August 4, 1957, a special feature article appeared in the "Sunday Pictorial" printed and published by the defendants, headed "Rock-a-Philip, Rock! Rock!" The article, after stating that certain persons had been criticising H.R.H. Prince Philip for his activities including gliding, and referring to the fact that he had occasional accidents with his car, or a fall in the polo field, continued as follows: "So what? Give us a chord in 'G' and we'll "sing Paul Boyle's version of 'Rock-a-Billy' in support of the "dashing Duke." It then set out two stanzas and two choruses of a lyric which ran as follows:

"Never mind what all the fuddy duddies say,
"Philip's making history in his own sweet way!
"If he wants to spread his wings, well, that's okay!
"What's the fuss about?

"*Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, rock!*
"Never mind the fogies that you shock, shock, shock,
"Everybody's got to learn to take a knock,
"*So Rock-a-Philip, Rock-a-Philip, Rock, Rock!*

"When he's playing polo, it's the same refrain:
"'Look at Philip sticking out his neck again!'
"What's the good of wrapping him in cellophane?
"Let him have his shout!

"*Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, rock!*
"Nobody could say that you're a crock, crock, crock,
"Every little tumble improves your stock,
"*So Rock-a-Philip, Rock-a-Philip, Rock, Rock!*"

The article ended with the words "With acknowledgments "to Joy Music Ltd., publishers of the Guy Mitchell hit song "'Rock-a-Billy.'"

In this action the plaintiffs claimed that the words of the lyric set out above were published in the newspaper without their consent and were a reproduction or colourable imitation of a substantial part of the words of the song "Rock-a-Billy," that the defendants had infringed the plaintiffs' copyright in the song and were aware that the publication of the words constituted such an infringement. They further claimed that each copy of the issue of the newspaper in which the words appeared was an infringement of their copyright in the song and was the plaintiffs' property, and that by selling or disposing of the same the defendants had converted it to their own use and intended to continue the acts of infringement and conversion. They accordingly claimed an injunction to restrain the defendants from printing or publishing in the "Sunday Pictorial" or elsewhere any substantial part of the song "Rock-a-Billy" or any colourable imitation thereof, and from selling or otherwise disposing of any copies of the newspaper containing any substantial part of the song or any colourable imitation of it; and damages for infringement of copyright and for conversion.

By their defence the defendants denied that the words published by them were a reproduction or colourable imitation of the song "Rock-a-Billy" or that they were guilty of any infringement or conversion. They contended that if the words published did constitute an invasion of the plaintiffs' rights (which they denied) the plaintiffs had consented to and/or acquiesced in the infringement. In support of the latter contention they relied on a telephone conversation alleged to have taken place at 6 p.m. on a day in the week ending July 27, 1957, in which Paul Boyle, the features editor of the "Sunday Pictorial" had informed a person of authority in the plaintiffs' office (whom the defendants were unable to identify) that he was writing a parody of the song "Rock-a-Billy," probably adding that the subject-matter of the parody was to be the activities of H.R.H. Prince Philip, and in which he said he assumed it would be all right provided that the usual acknowledgment to the publishers was made at the foot, and had been informed that that was all right.

By their reply the plaintiffs denied giving consent to the publication, and claimed that, if anyone purported to give his consent thereto on behalf of the plaintiffs, such person acted without the knowledge, consent or authority of the plaintiffs.

K. E. Shelley Q.C. and *Helenus Milmo* for the plaintiffs. The plaintiffs are admittedly the owners of the copyright of the song "Rock-a-Billy" which proved a sound commercial success. They claim to be entitled to the usual rights of copyright in the chorus of that song although the chorus in fact consists only of the word "Rock-a-Billy" and its first syllable "Rock" used in a particular collocation. Ninety per cent. of the commercial value of the song lies in the chorus. The defendants have copied the rhythm of the words of the chorus and have parodied the word "Rock-a-"Billy" by changing it to "Rock-a-Philip." That constitutes a breach of the plaintiffs' copyright.

The nature of copyright in a song has changed over the last 10 years. A popular song no longer contains the ingredients which popular ballads used to contain. Now everything has to contain rhythm. A considerable number of songs consist of one word, giving an easy peg on which singers and dancers can express their emotion. It is that "gimmick" which gives the particular song its popularity. It is submitted that the way in which the word or words are repeated and sung are essential parts of the song. The whole of the article published in the "Sunday Pictorial" leads to an admission of copying the plaintiffs' song although only the chorus has in fact been taken. The writer has been at pains to point out that his lyric is based on the plaintiffs' song, describing it as "Paul Boyle's version" of that song.

Under section 1 (1) of the Copyright Act, 1956, the owners of copyright have the exclusive right to do, and to authorise other persons to do, certain acts in relation to the copyright work. The acts which unauthorised persons are prohibited from doing are particularised in section 2 and include reproducing the work in any material form: see section 2 (5). "Reproducing" includes reproducing a substantial part: see section 49 (1). Here clearly the defendants have reproduced a substantial part of the plaintiffs' song and therefore have infringed the plaintiffs' copyright.

[McNair J. Is there any authority which decides whether a parody is an infringement?]

There is no decision directly on the point, but assistance may be derived from a dictum of Younger J. in *Glyn* v. *Weston*

Feature Film Co.[2] It is submitted that the lyric in this article is not a true parody because it does not poke fun at the original work but at H.R.H. Prince Philip. There has been a taking of the chorus of the plaintiffs' song for that purpose, and that clearly is an infringement.

F. E. Skone-James and *David Hirst* for the defendants. It is not disputed that the song " Rock-a-Billy " is an original work, but the syllables " Rock-a- " are the only part taken and cannot be regarded as a literary work and so subject to copyright. The " gimmick " of the plaintiffs' song involves a combination of words, music and rhythm, but the only claim for infringement is in respect of words. Singing " Rock-a-Billy " to a particular tune and in a particular way may have a literary value, but regarding the song purely as a word work it is submitted that taking the expression " Rock-a- " from the chorus and using it in the way the defendants have done does not constitute a taking of a substantial part of the work within the meaning of section 49 (1) of the Act of 1956. The defendants merely chose a hit tune and attached to it words of parody, using just enough of the words of the original song to give a twist to the parody. This lyric could be put on the market with different music. The plaintiffs' claim amounts to a claim for copyright not in words but in accent, but that is not a literary copyright. In any event there is nothing peculiar or original about this metre. The words of the song can be read to a different metre, so it cannot be said that there is any copyright in the metre at all.

On the question whether a parody constitutes a breach of copyright, see *Hanfstaengl* v. *Empire Palace*,[3] which is discussed in Copinger on Copyright, 9th ed., p. 156. Reliance is placed on the observations of Lindley L.J.[4] to the effect that amusing sketches in " Punch " of tableaux vivants or pictures in the Royal Academy could not be regarded as infringing the copyright in the pictures. Admittedly when dealing with an artistic work it is apparent from the degree of resemblance between the copy and the original whether or not a substantial part of the whole has been taken.

Whether or not there has been an infringement is a question of fact, but in the case of a literary work the difficulty is to discover the principle to apply in deciding whether a substantial part of the original has been taken. In considering what is "substantial," regard must be had to the purpose for which the copyright material has been taken: *per* Lindley L.J. in the *Hanfstaengl* case.[5] The test to be applied in relation to a parody is that suggested by Younger J. in *Glyn* v. *Weston Feature Film Co.*,[6] namely, whether the defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result. That appeals to common sense and has been adopted in other cases: see, for example, *Hawkes & Son (London) Ltd.* v. *Paramount Film Service Ltd.*,[7] which is a leading case on the meaning of "substantial part." Whether or not a substantial part has been taken has to be considered in relation to the original work and not to the alleged infringing material. In *Hawkes & Son (London) Ltd.* v. *Paramount Film Service Ltd.*[7] the first 28 bars of the song Colonel Bogey had been taken, and that was held to be the principal part of the work and an infringement. Those are not the facts of the present case.

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[2] [1916] 1 Ch. 261, 268; 32 T.L.R. 235.

[3] [1894] 3 Ch. 109; 10 T.L.R. 530, C.A.

[4] [1894] 3 Ch. 109, 130.

The plaintiffs' allegation in the statement of claim that this parody is a colourable imitation of the plaintiffs' song is irrelevant to a claim under the Copyright Act, 1956. The words "colourable imitation" appeared in the Act of 1911 but have been omitted from the later Act. "Reproduce" is not defined in the Act of 1956, although by section 48 reproduction is to include a record in the form of a cinematograph film.

In any event, if it be held that reproduction did in fact take place, it is submitted that permission was given by the plaintiffs to reproduce it in the form of a parody. That is sufficient for the defendants. The plaintiffs must have known that any parody produced would be in a lively style. They were entitled to withhold their approval until they saw a draft. If they did not choose so to do they must be taken to have consented to anything the defendants in fact produced. [Reference was made to *Francis, Day & Hunter* v. *Feldman & Co.*[8] and *Chappell & Co. Ltd.* v. *Thompson & Co. Ltd.*[9]]

Shelley Q.C. in reply. The case falls to be decided on first principles. The only question on liability is: Does what the defendants have done amount to a taking of a substantial part of the plaintiffs' copyright work? That is a question of fact to be

[5] [1894] 3 Ch. 109, 130.

[6] [1916] 1 Ch. 261, 268.

[7] [1934] 1 Ch. 593; 50 T.L.R. 363, C.A.

[8] [1914] 2 Ch. 728.

[9] (1934) Macg.C.C. (1928–35) 467.

decided by the court as a jury would decide it. The cases only decide the sort of direction a judge should give to a jury: see *per* Lindley L.J. in the *Hanfstaengl* case.[10] There is no better test than that the defendants have acknowledged that their lyric is based on the plaintiffs' original work. The writer himself claims to have rewritten the plaintiffs' song, but he has done so in a manner which does not cause it to lose its identity. Therefore it is his substitute for the original version.

[McNAIR J. That may be the crux of the matter. Is a substitute a taking of the original?]

It is submitted that it is so if there is a taking of a substantial part, as there must be in the present case by the repetition of the chorus, replacing "Billy" in the word "Rock-a-Billy" with "Philip." If the original song had never been published, it is inconceivable that the writer would ever have composed this lyric. Therefore the song "Rock-a-Billy" must have been the basis of his work. In a matter of this kind all the circumstances must be taken into account. As to the observations of Younger J. in *Glyn* v. *Weston Feature Film Co.*,[11] it is a novel idea that it is not an infringement if an original result has been produced even if that has been derived from an original work.

As to the defendants' contention that permission was given, the plaintiffs deny that any such permission was given by them or on their behalf by any authorised person.

McNAIR J. stated the facts and continued: The question I have to determine, it seems to me, under the Copyright Act, 1956, is whether in Paul Boyle's version of "Rock-a-Billy" it can be said that the defendants, to use the words of section 49 of the Act, have reproduced "a substantial part of the work." That is the issue of fact to which I have to direct myself: have the defendants reproduced a substantial part of the work the copyright of which is vested in the plaintiffs? In the statement of claim the allegation made is that the "said words are a repro-"duction or colourable imitation of a substantial part of the "words of the said song," but it seems to me that the words "or colourable imitation" are not strictly relevant to the case under the Copyright Act, 1956, at least in relation to an alleged infringement of literary copyright. The words "colourable imita-"tion" do appear in some of the earlier cases, and particularly in section 35 (1) of the Copyright Act, 1911, in the definition

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[10] [1894] 3 Ch. 109.

[11] [1916] 1 Ch. 261, 268.

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of "infringement"; but when the Act of 1956 came to define infringing copy, as it did in section 18 (3), the words "colourable "imitation" are not to be found. Accordingly, in my judgment, today, when considering infringements of literary copyright, colourable imitation is not a relevant consideration. The question is: has there been a reproduction of a substantial part of the words of the song?

I have had evidence called before me on behalf of the plaintiffs that, at any rate from the point of view of someone who is selling the song as a song accompanied by music, or from the point of view of someone who is hoping to sell a record of the words and music, the real point of the plaintiffs' song "Rock-a-"Billy" is to be found in the words of the chorus, and it is said that the gimmick, or stunt, or leading idea of this work is to be found in the chorus, and in the chorus as played with a "rock" emphasis, that being the particular form of musical emphasis embodied in the modern rock-and-roll. That I can quite understand; and the same witness also said that from the point of view of public performance the verses are quite immaterial and, indeed, may never be played at all. I can quite understand that that may well be so if this work is regarded as a musical production; but from the point of view of literary copyright it seems to me that similar considerations may not apply, and I have to look at the whole of the words of the song bearing in mind that special emphasis or weight has to be given to the words of the chorus because they are repeated four times as against the single reproduction of each verse. Whether or not there has here been a reproduction of a substantial part of the plaintiffs' work would, if I had been sitting with a jury as I well might have been, be a pure jury question which a jury would have to determine as a matter of fact, but before they could determine that they would have to receive directions from the presiding judge as to how they were to approach the matter.

It is on the question of this direction that I have been referred to a number of authorities, mostly not in this Division, where similar questions have been discussed, and it is quite clear that the question of substantiality is not determined solely by any process of arithmetic. It would not be right merely to say that the whole of the original copyright consisted of so many lines; the lines which appear in the alleged infringing copy were few, and, therefore, not a substantial part. One has really to look to a large extent—I will not say at the primary "idea," because idea cannot be the subject of copyright—but at the essential feature of the work which is alleged to have been subject to copyright. It has been said that the only leading directive in the cases is such as is given by Lindley L.J. in *Hanfstaengl* v. *Empire Palace*,[1] that is, to bear in mind that the whole conception of copyright is based upon monopoly, and the Acts, accordingly, had to be construed with reference to the protection of the owner's monopoly, but care must be taken always not to allow the Copyright Acts to be made instruments of oppression and extortion. "It is on such considerations as these that fair reviews "of literary works, although containing lengthy extracts from "them, are not infringements of the copyrights of them; that a "representation of part of a dramatic piece, if confined to some "comparatively insignificant part of it, is not an infringement "of the copyright in such piece."[2] He also observed that "in "doubtful cases the extent to which the copying has been carried "and the object sought to be attained . . . are matters which "must be considered"[3]: and then, after dealing with the sketches in question in that case, in which the court had to consider whether a reproduction in sketch form of some dramatic tableaux vivants, which themselves were based on the plaintiff's work, were infringements or not, Lindley L.J. decided that, on his appreciation of the facts, no unfair use had been made of the plaintiff's original copyright, and that there had been no substantial taking, and that was sufficient to settle the case. But he continued and gave this illustration of a use which was not an infringement, namely, "The amusing sketches in 'Punch' of the "pictures in the Royal Academy are not, in my opinion, infringe"ments of the copyrights of those pictures, although probably "made from the pictures themselves,"[4] and there it seems to me the judge is saying: "These are not infringements judged by the "purpose and intention with which they had been produced."

It is clear to me that what Paul Boyle, the person responsible for this feature article in the "Sunday Pictorial," did was, as he states in the article itself, to make his own version of "Rock-a"Billy." He did not actually reproduce the words; he did not actually reproduce any part of the plaintiffs' song; but he made his own version of it. I was told that there is no reported decision on the question whether a parody of a copyright work is an infringement. It is clear that the mere use of an idea is not protected by copyright, and I have not been referred to any case where it has been held that the use of a particular metre, at any rate in a literary work, is the appropriate subject-matter of copyright. In *Glyn* v. *Weston Feature Film Co.*[5] Younger J. states[6]: "Making "all allowance for the fact that prior to the Act of 1911 literary "copyright did not include the acting right, it certainly is remark- "able that no case can be found in the books in which a burlesque "even of a play has been treated as an infringement of copy- "right, although burlesque, frequently more distinguished than "the thing burlesqued, is as old as Aristophanes, to take Mr. "Hartree's example. It may well be that as far as English law "is concerned one reason for this striking state of things is that "the older cases insist upon the necessity of establishing that the "alleged piracy is calculated to prejudice the sale or diminish "the profits or supersede the objects of the original work, whereas "it is well known that a burlesque is usually the best possible "advertisement of the original and has often made famous a work "which would otherwise have remained in obscurity." Then the judge continues: "More probably, however, the reason is to be "found involved in such observations as those of Lindley L.J. in "*Hanfstaengl* v. *Empire Palace*,[7] or in such a decision as that "of the Court of Appeal in *Francis, Day & Hunter* v. *Feldman* "*& Co.*,[8] or in the principle that no infringement of the plaintiffs' "rights takes place where a defendant has bestowed such mental "labour upon what he has taken and has subjected it to such "revision and alteration as to produce an original result." His final conclusion is[9]: "If, therefore, it were necessary for me to "express an opinion upon this aspect of the case I should decide "that on this ground also the plaintiff fails." The concluding observation is by no means an authority binding upon me, apart from the fact that the passage is obiter, but it provides me with a very clear indication as to the way in which I should decide this interesting question as to whether a parody can be held to be an infringement. If one had to direct a jury on this question, one would clearly tell them of these various tests that have been suggested as guiding tests, and it would be proper to emphasise to them this test which Younger J. suggested as to whether the defendant had bestowed such mental labour on what he had taken and subjected it to such revision and alteration as to produce an original work. I cannot help thinking that a jury with that direction would have said that, although it is clear that the article in the "Sunday

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[1] [1894] 3 Ch. 109; 10 T.L.R. 530, C.A.

[2] [1894] 3 Ch. 109, 128.

[3] Ibid. 129.

[4] Ibid. 130.

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[5] [1916] 1 Ch. 261; 32 T.L.R. 235.

[6] [1916] 1 Ch. 261, 268.

[7] [1894] 3 Ch. 109, 128.

[8] [1914] 2 Ch. 728.

[9] [1916] 1 Ch. 261, 269.

" Pictorial " had its origin in " Rock-a-Billy," it was produced by sufficient independent new work by Paul Boyle to be in itself, not a reproduction of the original " Rock-a-Billy," but a new original work derived from " Rock-a-Billy." And, that being my conclusion of fact, quite shortly I say that I am not satisfied that the article in the " Sunday Pictorial " does reproduce a substantial part of the words of the " Rock-a-Billy " song of which the plaintiffs have the copyright.

[His Lordship then said that his conclusion made it unnecessary for him to deal with other aspects of the case, in particular with the issue as to licence or permission. The evidence by which the defendants sought to make good that point, the onus of establishing which was plainly on them, was to be found in the evidence of Paul Boyle, at the material time the feature writer of the " Sunday Pictorial " specialising in musical and theatrical matters, which was to the effect that, it having come to the knowledge of the editorial board that attacks were being made on H.R.H. Prince Philip for certain of his activities, he was charged with the duty of preparing a feature article taking the opposite view. Having prepared his version of " Rock-a-Billy," a song familiar to him, appreciating that it was desirable to publish an acknowledgment of copyright material, he had a telephone conversation with someone in the plaintiffs' office, asked if there would be any objection, and was told that would be all right. His Lordship was satisfied that a telephone conversation did take place but it was not made plain by Paul Boyle that the parody to be published would include references to H.R.H. Prince Philip, and anyone who desired to obtain informal licence to use copyright material must explain clearly and fully the purpose or nature of the proposed infringing material and the purpose for which it was to be used. If a licence was to be relied on, it was essential that the purpose for which this material was to be used should have been drawn to the attention of the licensor, who might have refused to allow it to be used in that connection. He was not satisfied on the evidence that any licence was obtained from the plaintiffs which would justify the production of the article in the " Sunday Pictorial " if that production had been of such a character as would have, contrary to his view, involved an infringement.

It was unnecessary to express a view on damages. It was clear on the evidence that the song " Rock-a-Billy " was originally a valuable piece of property for the plaintiffs, but he was satisfied that by the time this publication was made its value had been largely exhausted, and the song had lost substantially the whole

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of its value before the production of this article. There would be judgment for the defendants.]

Judgment for defendants with costs.

Solicitors: *Davenport, Lyons & Co.; Nicholson, Graham & Jones.*

E. M. W.

C. A.

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Mar. 10, 11.

Sellers, Ormerod and Upjohn L.JJ.

BURTON *v.* WEST SUFFOLK COUNTY COUNCIL.

[1956 B. No. 2101.]

Highway — Nonfeasance of local authority — Inadequate drainage — Drainage works carried out by highway authority — Insufficient work done—Accident caused thereby—Whether misfeasance or nonfeasance.

In March, 1954, the defendants, as the highway authority, carried out certain drainage work to a road which improved its condition, but which was inadequate to prevent flooding when the road was subject to heavy rain. It was the practice of the roadman employed by the defendants to put out red flags by day and red lights by night whenever there was flooding which could be dangerous to vehicles. In December, 1954, after heavy rain and flooding but when the water had subsided, a patch of ice formed on that part of the road which tended to keep damp because of inadequate drainage. Had the drainage been adequate, there would not have been any ice. The red flags and red lights, which had been on the road while there was flooding, were removed by the roadman when the water had subsided.

The plaintiff was driving a car along the road when it ran on to the patch of ice causing it to skid and crash into a tree. The plaintiff was injured and the car was damaged. In an action by the plaintiff for damages:—

Held, (1) that, even where a highway authority had carried out drainage work, failure to provide adequate drainage by not doing sufficient work was an act of nonfeasance for which the highway authority was not liable.

Aliter if the work done had been negligently performed or created a new danger (post, pp. 78, 82, 83, 84, 85).

McClelland v. *Manchester Corporation* [1912] 1 K.B. 118; 28 T.L.R. 21 distinguished.

Dictum of Cassels J. in *Drake* v. *Bedfordshire County Council* [1944] K.B. 620, 626; 60 T.L.R. 304; [1944] 1 All E.R. 633 questioned.

(2) That there was no duty on the defendants to warn the plaintiff of the danger of ice being on the road, and, therefore, the plaintiff's claim failed (post, pp. 83, 84, 85).

Sheppard v. *Glossop Corporation* [1921] 3 K.B. 132; 37 T.L.R. 604, C.A. applied.

Decision of Salmon J. affirmed.

APPEAL from Salmon J., sitting at Ipswich.

Shortly before 9 p.m. on December 11, 1954, the plaintiff, Peter Smith Burton, was driving a Wolseley motor-car along the Cambridge to Haverhill road when he ran on to a patch of ice which caused the car to skid off the road into a tree. The car was damaged and the plaintiff was injured.

The ice had formed across the road for a distance of about 58 feet at the lowest part of the road in a position where flooding frequently took place at a time of heavy rain. The land sloped from the south to the road, and as the road had a camber the water generally collected on the south side of the road, but the passage of vehicles and the percolation of some of the water kept the north side of the road damp too. Additional drains had been put in in March, 1954, but flooding still occurred, though to a lesser degree than previously.

When flooding took place so as to be a danger to vehicles, it was the practice of the roadman employed by the defendants, the West Suffolk County Council, to put out red flags by day and red lights by night. There was heavy rain on December 8 and 9, 1954, and on the three days—December 8, 9, and 10, 1954—red flags and red lights had been exhibited on account of the flooding, but by the morning of December 11, 1954, the day of the accident, the water had subsided, and the experienced roadman thought that the flags and lights were no longer necessary.

A slight frost had set in early on December 11, 1954; at 6 a.m. the temperature was 31·3 degrees, at 9 a.m. 30·4 degrees, but by noon it had risen to 38 degrees. In the evening, the temperature had fallen to 30·7 degrees at 6 p.m. and 32·1 degrees at 9 p.m. The ice, which was on the road at the time of the accident, was described as a paper-thin coating. It was not, therefore, due to any appreciable flooding on that day, but it was on a part of the road which tended to keep damp from the water, which ran off the adjoining land, and had no adequate outlet through road drains.

The plaintiff brought this action to recover damages for the injuries he had sustained and for the damage to the car against the defendants as the highway authority responsible for the road.

The judge found that the road drainage, even after the work done in March, 1954, was inadequate, and this finding was not challenged. Since 1954, better drainage had been effected by the carrying out of additional work. In the course of his judgment, the judge said: "No one can be certain, but, in my view, "the strong probability is that if the road had been properly "drained at the time there would have been no ice at this point "where the accident occurred when the plaintiff passed."

The judge also found that the plaintiff was driving at a reasonable speed on the crown, or just over the crown, of the road, and that he was in no way to blame for the skid or its consequences as no reasonable, prudent driver would have been able to control it. Judgment was, however, entered for the defendants, because the judge held that no misfeasance on the part of the defendants had been established. The plaintiff appealed.

Stephen Chapman Q.C. and *Eric Myers* for the plaintiff. If a highway authority does not undertake any repairs to a road for which it is responsible, it incurs no civil liability. Before the Highways Act, 1959, it could have been indicted for lack of repair in the criminal courts. Equally, if it takes over a highway which is dangerous and does nothing to it, there is no civil liability. If a highway authority sets about doing something to a highway, be it repairs or otherwise curing a danger, it is no longer a nonfeasant authority, and if it does the work badly, whether by an act of commission or omission, it is liable in law for damages for misfeasance. In the present case the judge found that the work was ineffective to prevent flooding when the road was subject to heavy rain.

A highway authority must perform the work correctly; if it is carrying out drainage works, they must be effective to drain the road adequately, otherwise the public is being led into a trap. A highway authority is liable for negligence in the construction of a new highway; its duty is to see that it is reasonably safe for those using it: see *Baxter* v. *Stockton-on-Tees Corporation*[1] and the observations of Bailhache J. in *Thompson* v. *Bradford Corporation and Tinsley*.[2] The same duty ought to apply to improvements of an existing highway. Reliance is placed on the dictum of Lush J. in *McClelland* v. *Manchester Corporation*,[3] where he said of the doctrine of nonfeasance: "But this doctrine "has no application to a case where the road authority have done "something, made up or altered or diverted a highway, and have "omitted some precaution, which, if taken, would have made "the work done safe instead of dangerous. You cannot sever "what was omitted or left undone from what was committed or "actually done, and say that because the accident was caused by "the omission therefore it was nonfeasance." In the present case the judge distinguished *McClelland's* case[4] as one where the highway authority took over an incomplete road and created a trap in the construction of a new road. But the resurfacing and lighting carried out by the highway authority in *McClelland's* case[4] was an attempt to improve what was in its natural state an extremely dangerous highway: in that sense there is a similarity between the facts of that case and those of the present case.

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[1] [1959] 1 Q.B. 441; [1958] 3 W.L.R. 275; [1958] 2 All E.R. 675, C.A.

[2] [1915] 3 K.B. 13, 21.

[3] [1912] 1 K.B. 118, 127; 28 T.L.R. 21.

By setting out to effect a cure the defendants undertook an obligation to remove the danger of flooding, and if they had put drains in at the lowest part of the road, the drainage would have been adequate. It may seem odd that by doing something the defendants imposed upon themselves a more onerous liability than if they did nothing, but the whole doctrine of nonfeasance is anomalous; the doing of something is the essence of the distinction between misfeasance and nonfeasance. Lush J. said in *Moul* v. *Thomas Tilling Ltd.*,[5] in words which exactly cover the present case: "I endeavoured to make it clear in that case "[*McClelland's* case[6]] that it may be true to say that damage "resulted through the highway authority doing work badly, "although the immediate cause of the accident was their omission "to take some steps which they ought to have taken." So here the drainage work has been done badly in so far as drains were not put in at the lowest part of the road. [Reference was also made to *Shoreditch Corporation* v. *Bull*.[7]]

The plaintiff's contention is supported by *Drake* v. *Bedfordshire County Council*,[8] which is the only direct application of Lush J.'s dictum; but the point did not arise directly there, because the contractors, who failed to repair the gap left in the railings, did not have the immunity of highway authorities for acts of nonfeasance. Cassels J., however, basing himself on the principle of *McClelland's* case,[9] said that[10] the failure to repair the railings was an act of misfeasance. Two modern cases run counter to the plaintiff's contention, an Irish case, *Quinn* v. *Ministry of Commerce*,[11] and *Wilson* v. *Kingston-upon-Thames Corporation*.[12] But an earlier Irish case, *Breen* v. *Tyrone County Council*,[13] which supports the plaintiff here, was not cited in *Quinn's* case.[14] In the earlier case a highway authority was held liable when a horse was injured by defective planking used in a bridge.

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[4] [1912] 1 K.B. 118.

[5] (1918) 88 L.J.K.B. 505, 508; 34 T.L.R. 473, P.C.

[6] [1912] 1 K.B. 118, 127.

[7] (1904) 90 L.T. 210; 20 T.L.R. 254, H.L.

[8] [1944] K.B. 620; 60 T.L.R. 304; [1944] 1 All E.R. 633.

If in a badly lit road, as in *McClelland's* case,[15] a highway authority instals lighting which creates a danger, then although in general the lighting has improved the situation the lighting has not been installed in a proper way—that is, so as to make the road safe. One danger has been removed and another created. The fact that the work carried out by the highway authority has made matters better is nihil ad rem; the relevant question is whether it has made the road safe.

The defendants' roadman was negligent in failing to have the red lights out on the night of the accident as a warning of danger. By removing them prematurely, when there was sufficient water still left in the road to produce a large patch of ice in freezing conditions, he was guilty of negligence. By neglecting to give any warning the defendants misled the plaintiff. The possibility of ice forming out of the water left on the road was something which the defendants might have anticipated, and so long as there was water on the road capable of being frozen the red flags and red lights should have been displayed.

Martin Jukes Q.C. and *D. Hill-Smith* for the defendants. To succeed on the issue of negligence, the plaintiff has to show that there was a duty on the roadman to give warning of the danger from ice. The only practice proved was that the lights were displayed when the road was flooded. There was no evidence of any flooding on the night of the accident, and there was therefore no departure by the defendants from their practice. There being no flooding of the road on the night of the accident, negligence disappeared as a live issue. In any event, there was no duty on the defendants. Whether they should continue with their practice

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[9] [1912] 1 K.B. 118, 127.

[10] [1944] K.B. 620, 626.

[11] [1954] N.I. 131.

[12] (1948) 64 T.L.R. 533; [1948] 2 All E.R. 780; affirmed [1949] 1 All E.R. 679, C.A.

[13] (1908) 42 Ir.L.T. 250.

[14] [1954] N.I. 131.

[15] [1912] 1 K.B. 118.

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was a matter of discretion for them, not a matter of duty: see *Sheppard* v. *Glossop Corporation.*[16]

For two centuries it has been established that a highway authority is not liable for failure to repair a highway. That is the basic principle: *Russell* v. *Men of Devon.*[17] The exception is that if a highway authority proceeds by an act of misfeasance to create a danger it incurs liability. The act of misfeasance can be an act of commission or omission. The passage in *McClelland* v. *Manchester Corporation*[18] which was relied on shows that the duty being spoken of is in respect of the work being done. Lush J. said that[19] the doctrine did not apply where the highway authority "have omitted some precaution, which, if taken, "would have made the work done safe instead of dangerous." Emphasis is laid on "the work done." The parallel in the present case would be the insertion of improper drains. There was no suggestion that the drains were improperly constructed, but it was said that there were not enough of them.

The main complaint was that there was no drain put in at the lowest point of the road. That was a failure to do something which should have been done, not the doing of something which should not have been done. The effect of the submission for the plaintiff was that if a highway authority does something, it must do everything. There is no authority to support that submission. Local authorities frequently have a phased programme of road construction, maintenance and repair whereby they repair different parts of their roads gradually; it would represent a new terror to local authorities if, as soon as they repaired one mile of a five-mile road under their road repair programme, they became responsible in law for the proper maintenance of the other four miles.

Quinn v. *Ministry of Commerce*[20] supports the defendants. It is true that *McClelland* v. *Manchester Corporation*[21] was not referred to directly in *Quinn's* case,[22] but it was cited in *Wilson* v. *Kingston-upon-Thames Corporation*,[23] which was cited in *Quinn* v. *Ministry of Commerce.*[24] In the *Wilson* case[25] Morris J. rejected the submission that, where it was shown road repairs were badly done, subsequent lack of repair of the road causing

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[16] [1921] 3 K.B. 132; 37 T.L.R. 604, C.A.

[17] (1788) 2 T.R. 667.

[18] [1912] 1 K.B. 118.

[19] Ibid. 127.

[20] [1954] N.I. 131.

[21] [1912] 1 K.B. 118.

[22] [1954] N.I. 131.

[23] 64 T.L.R. 553; [1948] 2 All E.R. 780.

[24] [1954] N.I. 131, 136.

[25] 64 T.L.R. 553; [1948] 2 All E.R. 780, 782.

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an accident was misfeasance; it was held to be nonfeasance. So in the present case the accident was due, not to any bad drainage in March, 1954, but to the omission in December, 1954, to have proper drainage at the relevant part of the highway. That is simply nonfeasance.

There is no authority for the entirely novel submission advanced by the plaintiff. If it were accepted, the doctrine of nonfeasance would disappear in practice. It would involve a startling extension of the meaning of misfeasance.

Chapman Q.C. replied.

SELLERS L.J. stated the facts and continued: The question to be determined is, has the plaintiff established liability on the defendants? It appears that the defendants took over this highway in 1922. They did not construct the road. They contend, rightly, that they are not liable for nonfeasance.

The plaintiff has sought to rely on the defendants' liability in damages for active misfeasance by which the highway was made dangerous. The submission was, in effect, that if a highway authority undertakes the repair of a road but does not complete it sufficiently and adequately so that its condition still left a danger to road users, then that is misfeasance.

The only repair work relied on was that in March, 1954, when the defendants did some drainage work on the part of the road in question. The judge has found that the defendants improved the drainage. Precisely what they did is not clear, but it served to take some of the water off the road, and so made the road somewhat less liable to flooding and less unsafe than it had been before. There was clearly nothing which the defendants did then which created any danger actual or potential. Such work as was done was properly done. All that can be said is that enough was not done, which seems to be a clear case of nonfeasance.

Mr. Chapman's skilful and, if I may say so, bold argument was based mainly on observations of Lush J. in *McClelland* v. *Manchester Corporation*,[1] from which I will cite only one short passage. Lush J., a great authority on the common law, said [2]: "If a highway authority, therefore, leaves a road alone and it "gets out of repair, there is, of course, no doubt that no action "can be brought, although damage ensues. But this doctrine has "no application to a case where the road authority have done "something, made up or altered or diverted a highway, and have

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[1] [1912] 1 K.B. 118; 28 T.L.R. 21. [2] [1912] 1 K.B. 118, 127.

"omitted some precaution, which, if taken, would have made "the work done safe instead of dangerous. You cannot sever "what was omitted or left undone from what was committed or "actually done, and say that because the accident was caused by "the omission therefore it was nonfeasance." The views of Lush J. in that case were incorporated by him in the later case of *Moul* v. *Thomas Tilling Ltd.*,[3] where, in the course of a judgment given in the Divisional Court on appeal from the county court, Lush J. said[4]: "If the damage was caused—I may use "the words I used in *McClelland's* case[5]—because they chose to "do nothing at all to the road, they are not liable. I endeavoured "to make it clear in that case that it may be true to say that "damage resulted through the highway authority doing work "badly, although the immediate cause of the accident was their "omission to take some steps which they ought to have taken. "A highway authority make up a road, and, to make it safe, a "certain thing requires to be done; they do not do that thing, and "the road is unsafe in consequence—in one sense it is true to "say that the accident happens through that omission to take "the necessary steps, but in truth and in substance through their "not properly completing the work they have done. In a case "like that they are guilty of misfeasance, notwithstanding it was "an omission to do a certain act which was the immediate cause "of the accident. That is all I meant to say, and what I thought "I said, in *McClelland's* case." Then there was a passage at the very end of the judgment which was relied on in argument[6]: "I wish to guard myself against saying that, if a highway autho- "rity choose to make up or repair a road, or a section of a road, "there may not be a case of liability if they leave one spot, one "part of the road which they do repair, in a dangerous condition. "The case put during the argument as an illustration, that, if a "highway authority do choose to maintain a road in repair and "do work on that road, a case may arise in which it may be "necessary to consider whether, if, deliberately leaving one hole "open and confining their repair to another, doing one half of the "road and not the other, they can shelter themselves under this "doctrine that it is a case of mere nonfeasance as regards the "hole they do not repair. I express no opinion in regard to that, "because this case was not put on any such ground. I do not "see how it could have been. I have only added this, because I

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[3] (1918) 88 L.J.K.B. 505; 34 T.L.R. 473, D.C.

[4] 88 L.J.K.B. 505, 508.

[5] [1912] 1 K.B. 118.

[6] 88 L.J.K.B. 505, 509.

"did not wish it to be thought that, in my opinion, it necessarily "follows that a road authority is justified in making up one half "of a road and leaving the other half in a dangerous condition."

McClelland v. *Manchester Corporation*,[7] on which reliance was placed, and the observations particularly of Lush J., were referred to in the course of the judgments in *Sheppard* v. *Glossop Corporation*.[8] Bankes L.J. said[9]: "*McClelland's* case was decided by "Lush J. on the same principle, although I think the headnote "to the report does not sufficiently explain the decision. The "defendants in that case had taken over an existing highway at "the end of which there was a kind of ravine. They had made "up the road and had placed lights in it. There was apparently "beyond the ravine another street, and they had made up this "street also and placed lights in it. The jury came to the con"clusion that by so making up the two streets with the ravine "intersecting them the defendants had in effect set a trap for "passers-by, and that by lighting the streets at night they had "made the trap more dangerous because a passenger seeing a "continuous row of lights would assume that there was no "interruption of the highway. In answer to questions put by the "learned judge the jury found that the road as made up and "constructed was a danger to persons lawfully using it; that the "ravine which was unfenced was a hidden trap to persons using "the road." That is the decision in the *McClelland* case,[10] and it was on those facts a clear case of misfeasance.

The only other authority relied on was *Drake* v. *Bedfordshire County Council*.[11] Cassels J. decided that case, and it turned mainly on another point. In so far as Cassels J. found misfeasance, the facts—perhaps not fully reported—do not seem to me to establish any active creation of a danger. I entirely agree with what Salmon J. said with regard to it.* Salmon J. doubted the correctness of the dictum in *Drake's* case that the failure to repair the fencing was a misfeasance.

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[7] [1912] 1 K.B. 118.

[8] [1921] 3 K.B. 132; 37 T.L.R. 604, C.A.

[9] [1921] 3 K.B. 132, 140.

[10] [1912] 1 K.B. 118.

[11] [1944] K.B. 620; 60 T.L.R. 304; [1944] 1 All E.R. 633.

* The following is the relevant passage of Salmon J.'s judgment: ". . . in that case [*Drake's* case] "it was held first, that the hole in "the railings or the failure to repair "the railings was misfeasance and "not nonfeasance and, secondly, that, "in any event, as the action was "brought against the contractors, and "they had been negligent, they could "not claim the immunity of the high"way authority. It follows, there"fore, that the first point, which was "alluded to by Cassels J., was not "necessary for his decision. I am "bound to say that, if it had been, "I should have had grave doubts as "to whether I should have been able "to follow it."

Lush J.'s observations have, apparently, never been applied in the way argued by Mr. Chapman, and they could be, as it appears on their face, very far-reaching. There is an authority in this country, that of Morris J., in *Wilson* v. *Kingston-upon-Thames Corporation*,[12] and an Irish case before Lord MacDermott C.J. of *Quinn* v. *Ministry of Commerce*,[13] which are both authorities contrary to the view expressed by Lush J. In the *Kingston Corporation* case, a similar argument was advanced by counsel and was treated by Morris J. in this way[14]: "[Counsel "for the plaintiff] submitted that if he has shown that some "repairs were done at that point, but that those repairs were done "badly, then the defendants should be liable, because, had "the repairs been done properly, the accident would not have "happened. He further relied on *McClelland* v. *Manchester* "*Corporation*.[15] That authority has, however, to be read in "the light of the observations made by the Court of Appeal in "*Sheppard* v. *Glossop Corporation*."[16] Morris J. held that the lack of repair of the highway arose from nonfeasance and not from misfeasance in repairing the road negligently, and, therefore. there was no liability.

The kindred case which came before the courts in Northern Ireland arose from circumstances where the plaintiff after dark was riding a pedal-cycle on the main road leading from Newry to Dublin, and he was thrown from his bicycle owing to the presence of a pothole in the carriageway. In the course of his judgment, which turned on other matters as well as this particular point, Lord MacDermott C.J. said[17]: "In this respect the case is very "much on all fours with that of *Wilson* v. *Kingston-upon-Thames* "*Corporation*.[18] There an asphalt road had been repaired on two "occasions by the highway authority, the second repair being of a "temporary nature and consisting of putting tar-macadam into "the hole. This wore or worked out and the plaintiff whilst "cycling over the hole was thrown and severely injured. Morris "J. held that this was nonfeasance. In the course of his "judgment he said[19]: 'The injury to the plaintiff was not caused "'by the exercise on the part of the defendants of their duty to

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[12] (1948) 64 T.L.R. 553; [1948] 2 All E.R. 780; affirmed [1949] 1 All E.R. 679, C.A.

[13] [1954] N.I. 131.

[14] 64 T.L.R. 553; [1948] 2 All E.R. 780, 782.

[15] [1912] 1 K.B. 118.

[16] [1921] 3 K.B. 132.

[17] [1954] N.I. 131, 136.

[18] 64 T.L.R. 553.

[19] 64 T.L.R. 553; [1948] 2 All E.R. 780, 782.

" 'repair. It was not because they effected some temporary " 'repair . . . that this accident happened. The accident hap- " 'pened because the roadway was out of repair. Were I to " 'accede to the submission made on behalf of the plaintiff, I " 'would be not merely straining but also going in the face of " 'the established law on this matter.' I respectfully agree and " am quite unable to discern any material distinction between that " case and the present one."

I feel no doubt that this court would be going in the face of the established law on this matter if we accepted the plaintiff's argument, and like the judge, I have no hesitation in rejecting it.

The second point regarding the failure to exhibit red lights avails the plaintiff no better. The roadman seems to have been right when he concluded that there was no flooding and no necessity for lighting. There was no evidence that the defendants ever gave warning of a frosty or icy road in any way. But if the defendants did fail to assist road users in a way which was their practice (although I am not sure what the lights would convey to one unfamiliar with the road), there was no duty on them to light or give warning.

In *Sheppard* v. *Glossop Corporation* [20] a similar point had been taken in regard to lighting. Scrutton L.J. said [21]: " Mr. Eastham " admitted that the appellants were not bound in the first " instance to light the borough at all. Then if they have once " begun to light, are they bound to continue? Mr. Eastham " answered, Yes. I am unable to agree. It is left to their " discretion to light or not to light; therefore they need not light " at all; if for a time they light they may discontinue either " wholly or partially in point of time or in point of space, and " the mere discontinuance is no breach of duty. That is, of " course, subject to this; that if they place an obstruction in the " highway they must by lighting or warning, or by watchmen or " fences or other reasonable means, guard against the danger they " have themselves created." That case was considering the position under the Public Health Act, 1875, but those observations fit the present case and I can see no breach of duty in respect of that matter brought home against the defendants.

I would dismiss the appeal.

ORMEROD L.J. I agree, and I would add only a few words. Mr. Chapman, in the course of his argument, made two submissions. His first and main submission was that the defendants,

[20] [1921] 3 K.B. 132.

[21] Ibid. 145.

as a highway authority, were liable in this case because they were guilty of misfeasance. The second was that they were liable because the roadman had been guilty of negligence on the day of the accident by failing to put out warning flags or lamps, and the defendants were thereby liable.

The second submission was argued before the judge, but he made no reference to it in his judgment, and it may well be that he did not attach importance to it. The evidence was that this particular piece of road was liable to flood after heavy rain, and the defendants had caused warning flags or lamps to be put in the road when it was flooded. On the days previous to the accident the road had been flooded and flags and lamps had been put out. But on the day of the accident when the roadman left his work at mid-day the floods had gone, and, apart from a little dampness in the road, it was in a normal condition, and the roadman had, in consequence, decided not to put out any warnings. I find it difficult to see any breach of duty in these circumstances. The defendants had been in the habit of warning road users of floods, but there is no evidence that it was their practice to put out warnings in time of frost, and, in my judgment, there was no duty upon them to do so.

As to the first point, Mr. Chapman based his submission on the evidence that in 1954 the defendants had done some work on the road by making further inlets for surface water from the road to the drains, which work was inadequate to prevent flooding in time of heavy rain. He submitted that in these circumstances they were guilty of misfeasance. He agreed, of course, that, if a highway authority does nothing to remedy a defect in a road, there is no civil liability. A highway authority cannot be made liable in a civil action for nonfeasance. But he argued that if an authority sets out to do something to a highway, be it effecting a repair or curing a danger, then it is no longer a nonfeasant authority, but, if it does badly that which it sets out to do, either by omission or commission, then it is liable.

To apply that submission to the facts of the present case, Mr. Chapman argued that, once the highway authority began to improve or attempt to improve the drainage on the road by constructing additional inlets, they became liable for misfeasance if in the final result the drainage was inadequate. It was not suggested that the work was badly done or that it added an additional danger to the road in any way. Indeed, it was admitted that the additional drainage had effected some improvement.

The case upon which Mr. Chapman relied particularly was *McClelland* v. *Manchester Corporation*,[22] and particularly the passage from the judgment of Lush J.[23] to which reference has already been made by my Lord. The facts of that case were very different, and there seems no doubt that, on the facts as found by the jury, a danger on the road had been created, and that was a case where the local authority was guilty of an act of misfeasance. That was the view of the case taken by this court in *Sheppard* v. *Glossop Corporation*[24]: see *per* Bankes L.J.,[25] to which reference has already been made.

There can be no doubt that if the defendants, to use the words of Lush J. in the *McClelland* case,[26] had omitted some precaution which, if taken, would have made the work done safe instead of dangerous, the defendants would have been liable. But there is no evidence that the work done was dangerous; the contrary is the case.

I think the rule is clear. If a highway authority does work on a road by way of repair or reconstruction it must be done properly, and in such a way as not to cause a danger on the road. That does not mean, in my judgment, that in a case like the present one, where some work has been done and done properly to improve the drainage of the road, the defendants should be held liable for failing to do further work which would result in further improvement of the drainage, although without further work the road may still be liable to flooding. To hold otherwise would, in my judgment, be extending the rule as to misfeasance to a point far beyond that established by authority. I would dismiss the appeal.

UPJOHN L.J. I agree. The facts are not in dispute. The section of the road in question was liable to flooding after heavy rain. The defendants as the highway authority did some drainage work upon the road with a view to improving the conditions there. The works, which they did, were properly carried out in the sense that they were executed in a proper and efficient manner, and those works in themselves constituted no danger whatever to users of the road. The works, apparently, did improve conditions in the road from the point of view of flooding, but they did not cure it. The road was still liable to flood after heavy rain and the drainage was properly described as still inadequate.

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[22] [1912] 1 K.B. 118.
[23] Ibid. 127.
[24] [1921] 3 K.B. 132.
[25] Ibid. 140.
[26] [1912] 1 K.B. 118, 127.

Mr. Chapman's argument was really this, that, if a highway authority undertake to improve dangerous conditions in a road, they will be liable for misfeasance if they do not by their works substantially cure the danger. Thus, in this case, to make the road safe and no longer liable to flooding, the authority should have put in more surface drains, and, in particular, a surface drain in the lowest part of the road. This they did not do, and so it is argued that they are liable for misfeasance.

I am quite unable to accept the argument that this is a misfeasance on the part of the highway authority. By drainage works in themselves proper, the authority decreased the danger on the road, but they had not made it a completely safe road in times of heavy rain. They had done nothing improper, and have brought no dangers to users of the road which were not there before. It would be a most extraordinary situation if a highway authority, by improving dangerous conditions in a road, thereby assume an obligation to make the road completely safe from, for example, flooding. The judge said that he would require very clear authority to persuade him that the law would work in such a ridiculous fashion, and I agree with him.

I am satisfied that there is no such authority. True it is that Lush J. used some wide words in *McClelland* v. *Manchester Corporation*,[27] which have already been read by Sellers L.J. But it must be remembered that those words must be read in reference to the facts of that case, and the facts of that case were really very plain. The corporation had by its works created a trap for users of the road. Lush J.'s observations must also be read in the light of the observations (to which reference has already been made) of Bankes and Scrutton L.JJ. in the later case of *Sheppard* v. *Glossop Corporation*.[28]

In my view, properly understood, Lush J.'s words do not afford any support for the argument in the present case, which seems to me entirely contrary to principle.

On Mr. Chapman's second point that the defendants were in breach of duty in failing to put out lamps and flags in accordance with their usual practice, it seems to me clear that they were under no such duty: see *Sheppard* v. *Glossop Corporation*.[28]

[27] [1912] 1 K.B. 118, 127.

[28] [1921] 3 K.B. 132, 140, 147, 148.

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BURTON v. WEST SUFFOLK COUNTY COUNCIL.

But, in fact, their practice was only to warn against flooding, and on the night in question there was no flooding on the road.

I agree that this appeal should be dismissed.

Appeal dismissed, with costs.

Solicitors: *Ward, Bowie & Co. for Rustons & Lloyd, Newmarket; Berrymans.*

N. P.

C. A.
1960
March 18.

Sellers, Ormerod and Upjohn L.JJ.

BLOOMFIELD *v.* BRITISH TRANSPORT COMMISSION.

Legal Aid—Costs—Means of aided person—Whether damages awarded to him to be taken into consideration—Payment into court of sum greater than that awarded—Plaintiff legally aided, nil contribution —Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *ss.* 2 (2) (*e*), 4 (3).

Where the court is asked to exercise its discretion as to costs in favour of a successful party and to make an order for costs against a legally aided person, the court may take into account a sum recovered as damages by the person in receipt of legal aid in the proceedings, for such a sum is one of "all the circumstances" to which the court is enjoined by section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949,[1] to have regard when considering what is reasonable for a legally assisted litigant to pay in costs.

Dictum of McNair J. in *Nolan* v. *C. & C. Marshall Ltd.* [1954] 2 Q.B. 42, 44–45; [1953] 3 W.L.R. 257; [1953] 2 All E.R. 389; [1954] 2 Q.B. 42; [1954] 2 W.L.R. 285; [1954] 1 All E.R. 328, C.A. approved.

APPEAL from Pilcher J.

A railway worker, then aged 21, was injured at work and claimed damages against his employers, the British Transport Commission, for the loss of his right eye. After the trial had begun the employers admitted liability, and the trial proceeded on the issue as to quantum of damages only. The trial judge (Pilcher J.) awarded the plaintiff £1,500. The plaintiff was not satisfied with that amount, and appealed. It was contended on his behalf that the conventional figure established in recent years from which any tribunal should start when considering an award of damages for the loss of an eye was about £2,000. The Court of Appeal dismissed the appeal, rejecting the submission that an appeal could be based on any so-called conventional figure.

The plaintiff had been in receipt of legal aid both on his trial and on his appeal, his contribution being assessed at "Nil." The Commission asked that they might be awarded the costs of the appeal.

Marven Everett Q.C. and *H. Tudor Evans* for the Commission. The court considering what costs should be awarded against a legally assisted litigant is required by section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949,[1] to take into consideration that "his "liability . . . shall not exceed the amount (if any) which is a "reasonable one for him to pay having regard to . . . the means "of all the parties . . ." "Means" includes any damages which he may have recovered. This plaintiff has recovered £1,500 damages and that is a capital asset in his possession which should be available to satisfy the successful defendants' costs on the appeal. Nothing in the Act of 1949 makes an award of damages to a legally assisted person untouchable where costs are involved. In *Nolan* v. *C. & C. Marshall Ltd.*,[2] where there had been a payment into court which exceeded the amount of damages awarded, McNair J. took the view that the costs could be deducted from the award of damages, although the plaintiff was legally assisted. An appeal on quantum in that case was allowed,[3] so that the judge's view became obiter; but in *Graham* v. *C. E. Heinke & Co. Ltd.*[4] Donovan J. followed that dictum obiter.

If the power of the court on this matter is discretionary, any discretion which the court has does not override the principle that a successful party should recover his costs.

Patrick O'Connor for the plaintiff. The legal aid committee when granting a legal aid certificate to this plaintiff for the purpose of appeal excluded the award of £1,500 in considering his means.

[UPJOHN L.J. They treated section 4 (3) of the Act of 1949 as applying to an appeal?]

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[1] Legal Aid and Advice Act, 1949, s. 2: "(2) Where a person receives "legal aid in connection with any "proceedings— . . . (*e*) his liability "by virtue of an order for costs made "against him with respect to the pro- "ceedings shall not exceed the amount "(if any) which is a reasonable one "for him to pay having regard to "all the circumstances, including the "means of all the parties and their "conduct in connection with the "dispute."

S. 4: "(3) The regulations shall "include provision for securing that "the resources of a person seeking or "receiving legal aid shall be treated "as not including the subject matter "of the dispute."

[2] [1954] 2 Q.B. 42; [1953] 3 W.L.R. 257; [1953] 2 All E.R. 389.

[3] [1954] 2 Q.B. 42; [1954] 2 W.L.R. 285; [1954] 1 All E.R. 328, C.A.

[4] [1958] 1 Q.B. 432; [1958] 2 W.L.R. 224; [1958] 1 All E.R. 365.

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COMMISSION.

[SELLERS L.J. Section 4 (3) is hardly appropriate where the plaintiff cannot fail to obtain less than £1,500.]

The court has a complete discretion as to costs and can do what it thinks right. Both the cases cited (supra) are distinguishable from the present as cases where there had been payments into court; and the plaintiffs who chose not to take the money out could be said to have been guilty of misconduct.

[ORMEROD L.J. But the basis of the decisions in those cases was that an award of damages is a capital asset?]

It is entirely a matter for the discretion of the court.

SELLERS L.J. This court approves of what was said by McNair J. in *Nolan* v. *C. & C. Marshall Ltd.*,[1] accepted as it was in that case on appeal, and particularly by Birkett L.J.[2] I think the matter is open to consideration by this court. I can see no ground for depriving the defendants, the respondents to this appeal, of their costs, or any good ground why the full costs should not be awarded. But they will have to come out of the damages which the plaintiff has been awarded, and it is desirable that the damages should not be reduced more than necessary. This court, applying the best consideration it can to the matter, will itself assess the amount of costs as not exceeding the sum of £75. That will avoid a taxation and further expense and, I hope, do justice between the parties.

ORMEROD and UPJOHN L.JJ. concurred.

Order for costs not exceeding £75 accordingly.

Solicitors: *M. H. B. Gilmour; Moodie, Randall, Carr & Miles for Bankes, Ashton & Co., Bury St. Edmunds.*

M. M. H.

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[1] [1954] 2 Q.B. 42; [1953] 3 W.L.R. 257; [1953] 2 All E.R. 389.

[2] [1954] 2 Q.B. 45, 46. Birkett L.J. said: "But in considering costs "under section 2 (2) (*e*), where the "words are 'shall not exceed the "'amount . . . which is a reasonable "'one for him to pay having regard "'to all the circumstances, including "'the means of all the parties . . .' "I think that if a man has recovered "£500 or £1,000 or £10,000, whatever "it might be, that is certainly one of "the circumstances of the case. It "is certainly a matter of which the "statute enjoins one to take account, "and I think that it ought to be "brought into account."

REGINA *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SHUTER.

1959
July 7.

Lord Parker C.J., Slade and Davies JJ.

Fugitive Offender—Offences within Act—Evidence—Order by dominion court—Offences " punishable . . . by imprisonment with hard labour " for a term of twelve months or more, or by any greater punishment "—Order setting out punishments—Whether admissible as evidence of punishments stated in it—Whether statements as to punishments statements of fact or law—Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *ss.* 9, 29.

Evidence—Dominion law—Practice—Desirability of expert evidence—Evidence (Colonial Statutes) Act, 1907 (7 *Edw.* 7, *c.* 16), *s.* 1.

Fugitive Offender—Habeas corpus—Jurisdiction—Unlawful detention of applicant—Jurisdiction to remit matter to magistrate.

An applicant for a writ of habeas corpus had been committed to prison to await his return to Kenya by a warrant of the chief magistrate, acting under the provisions of Part I of the Fugitive Offenders Act, 1881.[1] No expert evidence of the law of Kenya was adduced before the chief magistrate, who acted, inter alia, upon an order signed by the senior resident magistrate in Nairobi, which referred to 11 counts of offences alleged to have been committed by the applicant in Kenya, upon which the applicant was to be arrested, and set out the maximum penalty for each offence. In respect of 9 of the 11 counts this penalty was stated to be imprisonment for a period exceeding 12 months.

The applicant contended first, that this order was not admissible under section 29 of the Act of 1881 as evidence of the penalties applicable to the offences with which he was charged, and secondly, that if it was, it did not furnish evidence that the offences were offences within section 9 of the Act:—

Held, (1) that, in cases under the Act, there should be a settled practice that an expert on the local law should give evidence, either in the form of a deposition accompanying the warrant of arrest from the dominion concerned, or orally before the magistrate in this country. The practice of receiving copies of local statutes, penal

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

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[1] Fugitive Offenders Act, 1881, s. 9: "[Part I] of this Act shall "apply . . . to every offence . . . "which is for the time being punishable in the part of Her Majesty's "dominions in which it was committed, . . . by imprisonment with "hard labour for a term of twelve "months or more, or by any greater "punishment; and for the purposes "of this section, rigorous imprisonment, and any confinement in a "prison combined with labour, by "whatever name it is called, shall be "deemed to be imprisonment with "hard labour. . . ."

S. 29: " . . . Depositions (whether "taken in the absence of the fugitive "or otherwise) and copies thereof, "and official certificates of or judicial "documents stating facts, may, if "duly authenticated, be received in "evidence in proceedings under this "Act. . . ."

codes and ordinances in evidence under the provisions of the Evidence (Colonial Statutes) Act, 1907, was not satisfactory, since no one except an expert could be sure that the document was the latest version of the local law.

(2) That it was doubtful whether the order was evidence under section 29 of the Act of the matters stated in it, since it stated what were, so far as the senior resident magistrate was concerned, not matters of fact but propositions of law.

Per Lord Parker C.J. Even if the order were evidence of the matters stated in it, it is doubtful whether the evidence showed that the offences referred to were offences within section 9 of the Act, since on a natural reading of the section the words "or by any "greater punishment" do not refer to ordinary imprisonment for a period exceeding 12 months, and the words "or more" refer to a sentence of more than 12 months' imprisonment accompanied by hard labour.

(3) That, even though the applicant was wrongly detained, there was inherent jurisdiction in the court to remit the matter to the chief magistrate to be dealt with in accordance with what should become the settled practice.

Dicta of Lord Alverstone C.J. and Darling J. in *Rex* v. *Governor of Brixton Prison, Ex parte Percival* [1907] 1 K.B. 696, 705, 708; 23 T.L.R. 238 applied.

Application for a writ of habeas corpus.

The applicant, Victor Charles Shuter, applied for a writ of habeas corpus ad subjiciendum addressed to the Governor of Brixton Prison, where the applicant was detained to await his return to Kenya by virtue of a warrant of committal made by Sir Laurence Dunne, the chief magistrate, at Bow Street on June 17, 1959, under the provisions of Part I of the Fugitive Offenders Act, 1881. The applicant had been brought before the chief magistrate under a warrant of arrest issued by the senior resident magistrate in Nairobi, Kenya, and endorsed in the United Kingdom. Attached to the warrant were the depositions taken in Nairobi, and an order for the issue of the warrant signed by the senior resident magistrate. No expert evidence of the law of Kenya was adduced before the chief magistrate, whose attention however was drawn to the order; this was headed "Inquiry under the Fugitive Offenders Act" and referred to eleven counts of offences which the applicant was alleged to have committed in Kenya at the end of 1958 and the beginning of 1959, upon which he was to be arrested, setting out the maximum penalty which could be imposed for each offence. In nine cases out of the eleven the maximum penalty was stated to be imprisonment for more than a year, but in none of them was there any reference to imprisonment with hard labour.

The applicant also applied for relief under section 10 of the Act of 1881; the case is not reported upon this point.

Neil Butter for the applicant. The chief magistrate was not entitled to commit the applicant without evidence of the law of Kenya with regard to the punishment for the offences alleged against him. The order signed by the senior resident magistrate in Nairobi contains no mention of hard labour, but only specifies terms of imprisonment, and offences punishable with imprisonment only, of however long a period, are not offences to which Part I of the Act applies. In any event, the order was not intended to be a statement of the law of Kenya. [Reference was made to *Rex* v. *Governor of Brixton Prison, Ex parte Percival*[2] and *Rex* v. *Secretary of State for India in Council, Ex parte Ezekiel.*[3]] Further, the statements of maximum penalties in the order were not admissible under section 29 of the Act, since they were, quoad the senior resident magistrate, not matters of fact but propositions of law. In cases which involve the proof of foreign law, the custom is to call oral expert evidence, and this is the proper method.

John Mathew for the Government of Kenya and H.M. Secretary of State for Home Affairs. The statements of maximum penalties in the senior resident magistrate's order were admissible as evidence of the law of Kenya before the chief magistrate, since they were, in his court, statements of fact. It is conceded, however, that the statements of maximum penalties in the order were not sufficient to show that the offences alleged were offences to which Part I of the Act applied.

In fact, however, the offences alleged are within Part I, for by the Criminal Justice Ordinance, 1957, which abolished imprisonment with hard labour in Kenya, it was provided that all persons serving prison sentences might be kept to labour. This Ordinance was not before the chief magistrate, but will be admissible under the provisions of the Evidence (Colonial Statutes) Act, 1907, if the case is sent back to him. Read with the provisions of the Kenya Penal Code, which was before the chief magistrate, and the senior resident magistrate's order, this provides the necessary evidence that the offences fall within Part I of the Act of 1881.

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[2] [1907] 1 K.B. 696; 23 T.L.R. 238.

[3] [1941] 2 K.B. 169; [1941] 2 All E.R. 546.

J. H. Buzzard for the Governor of Brixton Prison. The applicant's submissions are conceded. It is submitted that although the reception of Government printers' copies of statutes, penal codes and ordinances is authorised by the Act of 1907, the safer course is in all cases to call expert evidence of the local law, since it is dangerous to assume that such statutes, codes and ordinances have not been amended or repealed since they were first enacted.

LORD PARKER C.J. In these proceedings Mr. Butter moves for a writ of habeas corpus on behalf of one Victor Charles Shuter, now detained in Brixton Prison pursuant to an order of committal made by Sir Laurence Dunne, the chief magistrate, under the Fugitive Offenders Act, 1881. There is in the alternative an application for relief under section 10 of that Act.

The applicant is accused of having committed a number of offences in Kenya at the end of 1958 and the beginning of 1959. There are some eleven charges, consisting of forgery, uttering false documents, theft, obtaining cash and goods by false pretences and obtaining credit. There is a warrant from Kenya duly authenticated for his apprehension and return to Kenya, and there is no doubt that the depositions from Kenya, which were of course admissible as evidence before the chief magistrate, raised a strong case that the applicant had committed the offences mentioned in the warrant, so as to justify the chief magistrate in committing him to prison to await his return under section 5 of the Act of 1881. What is said, however, is that there was no evidence before the chief magistrate that the offences with which he was charged were offences to which the Act applied.

[His Lordship read section 9 of the Act, and continued:] The only evidence before the chief magistrate of the law of Kenya—which I may refer to as the local law—in regard to the punishment for these offences, if it be evidence at all, is to be found in a document attached with the depositions to the warrant, which was an order by the senior resident magistrate in Nairobi that a warrant of arrest be issued. It reads in this way: "Inquiry under the Fugitive Offenders Act, 1881. The "Queen *v.* Victor Charles Shuter. I order that a warrant of "arrest be issued for the apprehension of Victor Charles Shuter "formerly an officer of the Kenya Prisons Service on the eleven "counts in the charge sheet hereto attached marked 'A.'" There then follows a reference to the eleven counts, beginning: "Count 1: Forgery, being a felony rendering the offender liable "to imprisonment for three years." Thereafter it goes through all the eleven counts, setting out the period of imprisonment for which the offender is liable. In passing it is to be observed that in nine cases out of the eleven the liability to imprisonment was to imprisonment for more than a year; and secondly, it is to be observed that in no case is there any reference to imprisonment with hard labour.

However, I have very grave doubts whether that document is any evidence of the punishment to which the offender would be liable in Kenya. Whether it is any such evidence depends on the construction of section 29 of the Act. The relevant part of that section is in these words: "Depositions (whether taken "in the absence of the fugitive or otherwise) and copies thereof, "and official certificates of or judicial documents stating facts, "may, if duly authenticated, be received in evidence in pro-"ceedings under this Act." No doubt the order is a judicial document, but so far at any rate as the author, the senior resident magistrate at Nairobi, is concerned, what is set out there in regard to the liability to punishment can hardly be said to be setting out facts; he was setting out the law, and, accordingly, I have very grave doubts whether that document was admissible under section 29 before the chief magistrate as evidence of the law of Kenya in regard to punishment.

Quite apart from that, there is nothing in the order to indicate that the respective periods of imprisonment there referred to are periods of imprisonment with hard labour or periods of imprisonment of such a character as to come within the words of section 9: "for the purposes of this section, rigorous im-"prisonment, and any confinement in a prison combined with "labour, by whatever name it is called, shall be deemed to be "imprisonment with hard labour." It is true that on one reading of that section it could be said that as in nine out of the eleven offences the punishment set out in the document is more than twelve months, those offences are covered by the words in the section, "or by any greater punishment." I confess that I feel great difficulty in any such construction. It seems to me that the more natural way to read the section is that the words "or "more" are referring to a sentence of imprisonment of more than twelve months accompanied by hard labour.

There is no doubt that this is a technical objection. It is most unlikely, looked at as a matter of common sense, that the senior resident magistrate in Nairobi would set his hand to such a document as this order, headed, as it is, "Inquiry under the

"Fugitive Offenders Act," without verifying that the offences were offences within that Act. It would be, as a matter of common sense, still more extraordinary if in fact these offences of forgery, false pretences and the like were not offences to which the Fugitive Offenders Act applied at all; but be that as it may, the matter must be looked at strictly.

In *Rex* v. *Governor of Brixton Prison, Ex parte Percival*,[1] a case not unlike the present one, Lord Alverstone C.J. said[2]: "In my opinion every person who comes and asks for an order "for the delivery up of a fugitive offender must be prepared with "evidence that that condition of the statute has been fulfilled. "That is a very important matter, and having regard to the fact "that we are dealing with the criminal law, we must apply the "general principles of the criminal law, and the prosecutor must "make out his case. We are also dealing with a branch of the "criminal law which affects the liberty of the subject, and that "condition should under ordinary circumstances be clearly ful"filled." That view was expressed directly in regard to the calling of evidence as to the local law. I incline to the view, as I have said, that there was no evidence at all before the chief magistrate as to the law in regard to punishment, and in any event no evidence that the offences came within section 9 in regard to hard labour. But whether I am right or wrong, I feel very strongly that in these cases there should be a settled practice, and that in every case an expert on the local law should give evidence, either in the form of a deposition which comes over with the warrant or orally before the chief magistrate in this country. So far as the present case is concerned, I think that the proper course is to remit the matter to the chief magistrate in order that it may be dealt with in accordance with what I hope will become the settled practice.

Mr. Butter, to whom the court is greatly indebted for his argument, has contended that there is no jurisdiction in this court to remit the matter. He points out what is undoubtedly true, that on the view I have expressed the chief magistrate had no jurisdiction to commit the applicant, and that the applicant is at this moment wrongly detained. That I fully appreciate, but it seems to me that in a proper case—and I think this is a proper case—the court must have inherent jurisdiction to take that course. In *Percival's* case[3] Lord Alverstone C.J. and Darling J. both took the view that there was jurisdiction to send the case back. Lord Alverstone begins his judgment by saying[4]: "Having regard to the serious nature of the offence if "proved, I have been much pressed with doubt as to whether "we ought not to send the case back in order that the evidence "which is suggested as being wanted should be supplied." Darling J. said[5]: "What I have a doubt about in this case is "whether we are justified in deciding it without doing that "which I am quite clear we could do, viz., either send it back "to the magistrate and point out to him the defect in the pro- "ceedings as they at present come before us, and allow him to "have the prosecution reopened and evidence given, or else "require for our own information an affidavit showing what "the law of Victoria applicable to this case is." Both Lord Alverstone C.J. and Darling J. clearly took the view that it was possible to remit the case, or alternatively to receive further evidence in this court. It is true that in that case they did not do so, but that was for particular reasons, one of which was that the alleged offence had occurred some five or six years before, and another that the prisoner had endeavoured to make reparation and was carrying on an honest life. Thus, in all the circumstances of that case they did not exercise what they undoubtedly considered to be their inherent power to remit.

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[1] [1907] 1 K.B. 696; 23 T.L.R. 238.

[2] [1907] 1 K.B. 696, 706.

[3] [1907] 1 K.B. 696.

At one time I was inclined to the view that the matter might be most conveniently dealt with by invoking the Evidence (Colonial Statutes) Act, 1907, which provides by section 1 that copies of Acts, ordinances and statutes passed by the legislature of any British possession purporting to be printed by the Government printer "shall be received in evidence by all courts of justice in "the United Kingdom without any proof being given that the "copies were so printed." Following the power given by that section, it seemed that it might be a convenient course if this court received, and Mr. Mathew on the part of the Kenya Government tendered, the printer's copies of the relevant code and ordinances dealing with punishment for these offences. But as Mr. Buzzard quite rightly points out, no one except an expert can be sure that the statute or other document of which the printer's copy is tendered is the latest version of the local law. For all one knows it may have been recently amended and, as I am so anxious that there should be a settled practice in the matter, and a safe practice, it seems to me that in this and all cases there should be, as I have said, evidence from an expert on the local law. Accordingly, I would remit the matter to the

[4] [1907] 1 K.B. 696, 705.

[5] Ibid. 708.

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chief magistrate for him to receive evidence as to that local law.

[His Lordship proceeded to consider and dismiss the application for relief under section 10 of the Fugitive Offenders Act, 1881.]

SLADE J. I agree. I desire to add only this, that upon the construction of section 9 of the Act of 1881 for which Mr. Mathew contends, there was no evidence of any kind whatsoever before the chief magistrate to bring the offences within section 9, even assuming that the order signed by the senior resident magistrate at Nairobi was admissible in evidence. Indeed, Mr. Mathew's argument, as I understand it, is this: The counts contain no reference to hard labour, which is a condition precedent to bringing the offences within section 9, and you will not get much assistance from the Kenya Penal Code, but if you were further informed that there was a Criminal Justice Ordinance, No. 26 of 1957, and looked at that, you would see that although hard labour has been abolished in Kenya imprisonment there could take the form of rigorous imprisonment or some other form of imprisonment which falls within the words in section 9 "and any "confinement in a prison combined with labour, by whatever name "it is called, shall be deemed to be imprisonment with hard "labour." That Ordinance was not before the chief magistrate; moreover, the mere production of an Act of Parliament or a penal code does not necessarily mean that all of it is still extant or remains unaltered; indeed, we know that the Kenya Penal Code which was before the chief magistrate had been altered by this Criminal Justice Ordinance No. 26 of 1957. That is sufficient to send this case back to the chief magistrate.

With regard to the construction of section 9, the point does not now arise, but I find it difficult to believe that imprisonment for life is not a greater punishment than fifteen months' hard labour.

DAVIES J. I entirely agree with the judgments of my Lords.

LORD PARKER C.J. The applicant can apply for bail, the terms of bail to be fixed by the chief magistrate.

Application dismissed.
No order as to costs.

Solicitors: *Official Solicitor; Charles Russell & Co.; Director of Public Prosecutions.*

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McNair J.

Legal Aid—Costs—Taxation—Review of taxation—Summons in solicitor's name—Jurisdiction to consider summons—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1 (7)—*Legal Aid* (*General*) *Regulations*, 1950 (*S.I.* 1950, *No.* 1359) (*as amended*), *reg.* 18 (3) (*b*) —*R.S.C.*, *Ord.* 65, *r.* 27 (41).

At the conclusion of an action the costs of a legally aided plaintiff were ordered to be taxed as between solicitor and client, in accordance with the provisions of the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950 (as amended). In the course of taxation, substantial reductions were made in the fees allowable to counsel and solicitor, and after objections by the plaintiff had been disallowed the taxing master issued his allocatur. The plaintiff's solicitor thereupon took out a summons in his own name for review, which was adjourned for service on the Law Society. It was contended on behalf of both the Law Society and the solicitor that the judge in chambers had jurisdiction to undertake the review:—

Held, (1) that the reasons which justified a review of taxation by the judge in cases in which the party concerned was not legally aided applied equally to legal aid cases, and that the order for taxation under regulation 18 (3) (*b*) of the Legal Aid (General) Regulations, 1950, necessarily involved that the master and the judge should have jurisdiction to ensure that the taxation was in order; and, accordingly, that R.S.C., Ord. 65, r. 27 (41), should be construed as providing for a review in such cases.

Hammond v. *Hammond* [1957] P. 349; [1957] 3 W.L.R. 395; [1957] 3 All E.R. 16, and dictum of Devlin J. in *Rolph* v. *Marston Valley Brick Co. Ltd.* [1956] 2 Q.B. 18, 27; [1956] 2 W.L.R. 929; [1956] 2 All E.R. 50 not followed.

(2) That the solicitor's right to call for a review of taxation under R.S.C., Ord. 65, r. 27 (41), was a right arising out of his relationship with his client, which was expressly preserved by section 1 (7) of the Legal Aid and Advice Act, 1949, and, accordingly, the right might be exercised in a legal aid case.

Per curiam. There is much to be said for the view that, in the absence of statutory provision to the contrary, the court has inherent jurisdiction to secure that a solicitor as an officer of the court is remunerated properly and no more for his work as a solicitor.

SUMMONS for review of taxation of bill of costs delivered by the solicitor to a legally aided plaintiff, adjourned into open court for judgment.

The following statement of facts is taken in substance from

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

the judgment. On September 16, 1953, a civil aid certificate was issued in favour of a plaintiff, Arthur Richard Sutton, certifying that he was entitled to legal aid "as plaintiff to take proceedings "in the High Court of Justice, Queen's Bench Division, against "William Arthur Sears for damages for fraudulent misrepre-"sentation and to enforce any order for costs." The certificate further stated that the National Assistance Board had determined the plaintiff's maximum contribution as nil, and that the local committee had also assessed his contribution as nil.

On May 19, 1954, the plaintiff issued a writ against the defendant, claiming to have a conveyance entered into between the parties rescinded, and claiming damages for fraudulent misrepresentation on the sale of certain property known as 55–57, Stonecot Hill, Sutton. This writ was subsequently amended to include claims for damages for breach of contract and other relief. The action was tried before Havers J. over a period of 16 days between April 4 and June 4, 1957. His Lordship directed that judgment should be entered for the defendant with costs not exceeding certain limits, and further directed the plaintiff's costs to be taxed as between solicitor and client in accordance with the provisions of the Legal Aid and Advice Act, 1949.

The plaintiff's solicitor delivered his bill of costs as between solicitor and client, and it was taxed by Master Cullis. In the course of this taxation, substantial reductions were made in the fees allowable to counsel and solicitor. Objections were lodged to the taxation, stated to be "Objections taken by the "plaintiff to the taxation." These objections were considered by the taxing master and disallowed. Master Cullis then issued his allocatur, setting out his taxation of the plaintiff's costs as between solicitor and client in accordance with the Third Schedule to the Legal Aid and Advice Act, 1949. A summons was taken out by the plaintiff's solicitor in his own name, calling upon all parties concerned to attend upon the judge in chambers on the hearing of an application for an order that the taxation of costs by Master Cullis be reviewed, and that the objections made by the plaintiff's solicitor be allowed. In accordance with the usual practice the summons was not served on the plaintiff or any other person. The summons came before McNair J. and was adjourned for service upon the Law Society, who, in his Lordship's opinion, as the administrators of the legal aid fund were primarily interested. When the summons was restored counsel for the Law Society and for the plaintiff's solicitor both submitted that his Lordship had jurisdiction to undertake the review.

It was contended on behalf of the solicitor (1) that the review of taxation was an integral part of taxation and the mandatory requirement contained in regulation 18 (3) of the Legal Aid (General) Regulations, 1950, as amended, that, where the court gave judgment or made a final order in proceedings to which a legally assisted person was a party, the judgment or order should include a direction that the costs of any assisted person should be taxed in accordance with the provisions of the Third Schedule to the Act, necessarily involved that the proper authorities, namely, the taxing master and, on review, the judge, should have jurisdiction to ensure that the taxation was in order and completed; (2) that the solicitor's right to carry in objections to disallowances from his bill and, if the objections were overruled, to call for review by the judge, was a right arising out of the relationship of solicitor and client which was expressly preserved by section 1 (7) (*a*) of the Act; and (3) that in any event, there being no express provision to the contrary contained in the Act or regulations, the court by virtue of its inherent jurisdiction over its officers, including solicitors, had jurisdiction to entertain a review.

The case is reported solely upon the question whether there was jurisdiction to entertain the summons. No order for costs was requested on behalf of the solicitor and it was not suggested that the court had jurisdiction to make such an order.

J. H. Hames for the plaintiff's solicitor.
Colin Duncan for the Law Society.

Cur. adv. vult.

McNAIR J., reading his judgment: In this judgment I propose to confine myself to the question whether, when a direction has been given on the trial of an action, in which one or more of the parties is a legally assisted person, that the legally assisted person's costs be taxed as between solicitor and client in accordance with the provisions of the Third Schedule to the Legal Aid and Advice Act, 1949, and taxation has taken place, I, sitting as judge in chambers, have jurisdiction to review that taxation.

Devlin J., in *Rolph* v. *Marston Valley Brick Co. Ltd.*,[1] expressed obiter his doubts whether on the facts of the case before him he had such jurisdiction, though he in fact embarked on such a review and upheld the taxing master's allocatur. In *Hammond* v. *Hammond*[2] Karminski J., forming the view that Devlin J.'s reasoning in support of his doubts was unanswerable, held on the facts of the case before him that he had no jurisdiction to entertain a review. It appears that up to the decision of Devlin J. in *Rolph's* case [3] the normal practice in such cases was for the judge to entertain the review.

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[1] [1956] 2 Q.B. 18; [1956] 2 W.L.R. 929; [1956] 2 All E.R. 50.

[2] [1957] P. 349; [1957] 3 W.L.R. 395; [1957] 3 All E.R. 16.

[His Lordship stated the facts and continued:] Neither the Legal Aid and Advice Act itself nor the regulations made thereunder make any express reference to the review of taxation. The right to claim a review of taxation is conferred by R.S.C., Ord. 65, r. 27, and the regulations thereunder. Rule 27 provides as follows: "The following special allowances and general regula-"tions shall apply to all proceedings and all taxations in the "Supreme Court of Judicature."

An order for taxation in accordance with the Third Schedule to the Act is without doubt an order for taxation in the Supreme Court of Judicature. The particular form of taxation provided for by paragraph 4 of that Schedule, namely, a taxation as between solicitor and client, where the costs are to be paid out of a common fund in which the client and others are interested, is a particular method of taxation applicable to cases outside the Act. See *per* Buckley L.J. in *Giles* v. *Randall.*[4] By paragraph 4 of the Third Schedule this form of taxation is applied to taxation of the costs of legally assisted persons under the Act. By regulation 39 of the regulations in Order 65, r. 27, provision is made by which the solicitor may before the allocatur or certificate is signed carry in objections to the taxing master's certificate. By regulation 40 the taxing master is required, on such objections being made, to reconsider and review the taxation, and may tax the costs of such objections and add them to, or deduct them from, any sum payable by or to any party to the taxation. Up to this stage there cannot, as it seems to me, be any doubt at all that the whole of this procedure is applicable to a legal aid taxation, though no express provision seems to be made in the Legal Aid Regulations or in the Act for enabling the legally assisted person, who may, as in *Rolph's* case,[5] be financially interested, to obtain legal assistance to help him to resist the application or for enabling the interests of the legal aid fund, out of which the costs, when taxed, are to be paid, to be protected. Finally, by regulation 41 it is provided that "Any party who "may be dissatisfied with the certificate or allocatur of the "taxing officer . . . may . . . apply to a judge at chambers for

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[3] [1956] 2 Q.B. 18.

[4] [1915] 1 K.B. 290, 295.

[5] [1956] 2 Q.B. 18.

"an order to review the taxation . . . and the judge may there-"upon make such order as the judge may think just."

Prima facie, accordingly, it would seem that there is no reason why regulation 41 should not apply to the taxation of the costs in a legally aided case to the same extent as without question regulations 39 and 40 apply. The reasons that justify a review by a judge in appropriate cases, in a case in which the party is not a legally assisted person, seem equally applicable to a case where the costs arise in the case of a legally assisted person. In each case a review by the judge is desirable in order to secure that the taxation is properly carried out and is part of the machinery by which that object is achieved. Accordingly, unless there is authority to the contrary which I ought to follow, I am prepared to accept Mr. Hames' first main submission, and to hold that the order for taxation made at the trial of the action, as required by regulation 18 of the Legal Aid (General) Regulations, 1950, that the plaintiff's costs be taxed as between solicitor and client in accordance with the provisions of the Legal Aid and Advice Act, conferred jurisdiction upon me to entertain the review as part of the normal machinery of taxation.

Subject to the same reservation I would, though with less feeling of certainty, reach the same conclusion by a somewhat different process of reasoning, namely, that summarised in Mr. Hames' second main submission. By section 1 (5) of the Act it is provided that "Legal aid shall consist of representation, on "the terms provided for by this Part of this Act, by a solicitor "and so far as necessary by counsel . . . " The assisted person has the right, subject to certain limitations, to select his solicitor and counsel from the panels of solicitors and counsel willing to act—see section 6 (2)—and when appointed the solicitor is in truth the assisted person's solicitor though he is paid not by the client but out of the legal aid fund (section 6 (5)). But, as the result of section 6 (6) and paragraph 2 of the Third Schedule, the sums allowed to the solicitor in connection with the proceedings in the Supreme Court are stated to be the full amount allowed on taxation of the costs on account of disbursements and 85 per cent. of the amount so allowed on profit costs. As I have mentioned earlier, no provision is made either in the Act or in the regulations made thereunder in relation to the solicitor's right to carry in objections to the taxing master before the allocatur is made or to the procedure for review. It seems to me to be a necessary incident of these statutory provisions that the solicitor should have a right to attend the taxation of his own costs, and to carry in objections to the taxing master, and that this right arises out of the relationship between him and his client. If this be correct, it would also seem to me that his right to call for a review under R.S.C., Ord. 65, r. 27 (41), is also a right arising out of this relationship. Finally, by section 1 (7) it is provided that "Save as expressly provided by this Part of this Act . . . "(a) the fact that the services of counsel or a solicitor are given "by way of legal aid shall not affect the relationship between or "rights of counsel, solicitor and client or any privilege arising "out of such relationship." Accordingly, subject to the reservation mentioned above, I should be prepared to hold that the right of a solicitor to call for a review of a taxation of solicitor and client costs is expressly preserved by the Act.

Having reached these conclusions on the two main arguments addressed to me, I do not feel it necessary to express any concluded opinion upon the question of inherent jurisdiction. There is, however, in my judgment, much to be said for the view that, unless there is statutory provision to the contrary, the court has inherent jurisdiction to secure that the solicitor as an officer of the court is remunerated properly and no more for the work he does as a solicitor: see *Storer & Co.* v. *Johnson*[6] and *Cole* v. *Park.*[7]

Before considering *Rolph's* case[8] and *Hammond's* case,[9] it is convenient that I should list two groups of cases to which I was referred by counsel as being cases where a review of taxation of costs in legal aid cases was in fact entertained by judges of first instance. The first group consists of cases where review was undertaken but no point was raised as to the power for review. These cases are *Reed* v. *Gray*,[10] *Gibbs* v. *Gibbs*,[11] *Isaac* v. *Isaac*,[12] *Young* v. *Young and Kohler*[13] and *Francis* v. *Francis and Dickerson.*[14] The second group consists of cases in which a review was undertaken though some doubt or hesitation was expressed. These cases are *Self* v. *Self*,[15] *Theocharides* v. *Joannou*[16] and *Eaves* v. *Eaves and Powell.*[17] Finally, in *Lyon*

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[6] (1890) 15 App.Cas. 203.

[7] (1888) 41 Ch.D. 326.

[8] [1956] 2 Q.B. 18.

[9] [1957] P. 349.

[10] [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.

[11] [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.

[12] [1955] P. 333; [1955] 3 W.L.R. 253; [1955] 2 All E.R. 811.

[13] [1955] 1 W.L.R. 395; [1955] 1 All E.R. 796.

[14] [1956] P. 87; [1955] 3 W.L.R. 973; [1955] 3 All E.R. 836.

[15] [1954] P. 480, 485; [1954] 3 W.L.R. 119; [1954] 2 All E.R. 550.

[16] [1955] 1 W.L.R. 296, 298, 299; [1955] 1 All E.R. 615.

[17] [1956] P. 154, 159; [1955] 3 W.L.R. 984; [1955] 3 All E.R. 849.

v. *Lyon*[18] the Court of Appeal entertained an appeal from a review of such a taxation without comment.

I now turn to the two cases of *Rolph* v. *Marston Valley Brick Co. Ltd.*[19] and *Hammond* v. *Hammond.*[20] In *Rolph's* case[21] a legally assisted infant obtained a compromise judgment for £1,500 with costs. Jones J., approving the settlement, directed that, of the £1,500, £1,475 should be paid into court, where it became subject to a first charge under section 3 (4) of the Act to the net liability of the legal aid fund on the infant's account, arising from the difference between the party and party costs and the solicitor and client costs on taxation. Taxation duly took place and the plaintiff's solicitor carried in objections to certain disallowances made on the solicitor and client taxation, which objections were disallowed. The solicitor took out a summons to review the taxation. I was informed at the hearing before me that the summons was stated in terms to be an application on behalf of the plaintiff and not, as in the present case, an application on behalf of the plaintiff's solicitor. Devlin J. proceeded to carry out the review, but overruled the objections. Application was then made to him for a direction that the costs of the summons to review should be taxed under the Third Schedule to the Act. This application was rejected on grounds which are not strictly material to the problem before me, but, in the course of his judgment, Devlin J., after stating that the first of three possible grounds for dismissing the application was that "it ought not to have been entertained "at all on the ground that the solicitor is acting without the "authority of the client in whose name he purports to act," continued as follows[22]: "I do not propose to refuse the applica-"tion on the first ground because the point was not investigated "in the argument before me and I have not therefore got any "specific information about the nature of the solicitor's retainer. "As I intend to refuse the application on the other grounds I "have not felt it necessary that the expense should be incurred "of inviting a further argument from Mr. Ritchie on the first "point. But I think that probably I ought to have dismissed the "summons at the outset without going into the merits of it at all. "It is brought by the solicitor in the name of the assisted person. "But the solicitor cannot possibly have authority from the "assisted person to bring this summons. He could not be heard "to say that she was his client, for, if she was, he would be

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[18] [1953] P. 1; [1952] 2 T.L.R. 775; [1952] 2 All E.R. 831.

[19] [1956] 2 Q.B. 18.

[20] [1957] P. 349.

[21] [1956] 2 Q.B. 18.

[22] Ibid. 27.

"acting in breach of duty towards her by seeking to obtain money "from her estate partly for his own benefit. When the court "becomes aware that a solicitor is acting without authority, I "think that the court should act of its own motion and refuse "to grant relief: see *Daimler Co. Ltd.* v. *Continental Tyre & "Rubber Co. (Great Britain) Ltd.*,[23] *per* Lord Parker of Waddington.[24] That was a different type of case from this, but I "think that the principle is of general application and certainly "should be applied in a case where the relief would affect an "infant plaintiff who is unrepresented."

In that case, as distinct from the present case, the infant client was personally interested. But the reasoning that would lead to the rejection of the application to review on the basis of lack of authority would, as it seems to me, also lead to the rejection of the solicitor's original application to the taxing master, since any item allowed by the taxing master over and above the allowance in the party and party taxation would also be to the prejudice of the infant client. Accordingly, the court's direction for taxation under the Third Schedule would not be implemented without the employment of a second solicitor. For my part I am not satisfied that this line of reasoning, which raised doubts in Devlin J.'s mind as to his jurisdiction to entertain the review, should persuade me to depart from the conclusions I have stated earlier.

In *Hammond's* case [25] Karminski J. had before him an application to review the taxation of a legally aided petitioner's costs under the Third Schedule to the Act. The application, as in *Rolph's* case,[26] was brought in the name of the assisted person. It was conceded that the petitioner could neither suffer nor benefit from any variation of the order made on taxation. Nevertheless Karminski J., after referring to part of the passage in Devlin J.'s judgment which I have set out above, stated [27] that he had come to the conclusion that Devlin J.'s reasoning was unanswerable and that he ought to follow it. He concluded, accordingly, that he had no power to deal with the application.

I, for my part, however, though I hope I always show proper respect for the views of my brethren, do not, for the reasons I have already stated, feel that the reasoning is unanswerable. It seems to me that when the Act or the regulations thereunder require that the court should direct that the costs of the legally assisted person should be taxed as between solicitor and client on the basis indicated, the legislative authority necessarily envisaged that the legally assisted person's solicitor should carry in his bill for taxation, and should continue to act until the taxation was completed, including any necessary review. The taxation of a solicitor's bill as between solicitor and client is in truth more akin to the exercise of an administrative than a judicial function. The taxing master and, though with less practical experience in matters of costs, the judge, are as I think charged with the task, as a matter of administration, of seeing that the solicitor is remunerated properly and no more.

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[23] [1916] 2 A.C. 307; 32 T.L.R. 624.

[24] [1916] 2 A.C. 307, 337.

[25] [1957] P. 349.

[26] [1956] 2 Q.B. 18.

[27] [1957] P. 349, 355.

For my part, I should not be deterred from undertaking a review by reason of the fact that the application was expressed to be, as it was in the cases of *Rolph* [28] and *Hammond* [29] (but not in the present case), an application on behalf of the client, when in fact it is clear that the application is made on behalf of the solicitor. If the taxing master or the judge thinks fit in a particular case, I see no reason why a direction for service on any other party interested should not be made. It may well be that it is desirable that the regulations should be amended to provide for such service and for the manner in which a legally assisted person should be represented on such taxation, though, in cases involving infants, the jurisdiction, I am informed, is commonly exercised on an ex parte application by the solicitor without the infant being separately represented; the theory, I suppose, being that the taxing master is particularly well qualified to protect the interests of the infant. However that may be, I do not feel that the absence of such provision in the regulations debars me from exercising jurisdiction.

I accordingly conclude that I have jurisdiction to entertain the present application.

Ruling accordingly.
No order as to costs.

Solicitors: *Merton Naydler; Law Society.*

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[28] [1956] 2 Q.B. 18.

[29] [1957] P. 349.

1959
Oct. 7, 22.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

SCHNEIDER *v.* DAWSON.

Revenue—Customs and Excise—Duty free goods—Knowingly keeping and dealing with uncustomed goods — Goods imported duty-free for use of American servicemen — Unauthorised sale to civilian — Whether forfeiture sole penalty — Whether goods "chargeable with a duty "which has not been paid"—Goods entrusted to care of civilian—Whether civilian's conduct a "dealing with" them—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 44), *ss.* 257, 304.

Statute — Construction — Consolidating Act — Meaning of "chargeable "with a duty which has not been paid"—Customs and Excise Act, 1952, *s.* 304.

A civilian bought from American servicemen cigars and spirits which had been imported free of duty for the use of United States servicemen under an agreement between the British and American Governments, and kept them for his own use. Later, he desired to buy a further supply of cigars and met an American serviceman by appointment. This serviceman had 2,420 cigars in his possession, imported duty-free as described above. He told the civilian that he intended to sell the cigars, and asked the civilian to look after them. It was arranged that the civilian should extract as many of the cigars as he wished. He took charge of the cigars and later extracted 100 for his own purposes.

He was charged with knowingly and with intent to defraud Her Majesty of the duty payable thereon being concerned in keeping goods, namely, the cigars and spirits first described above, which were chargeable with a duty which had not been paid; and, with the like knowledge and intent, being concerned in dealing with the 2,420 cigars, which were chargeable with a duty which had not been paid; in each case contrary to section 304 of the Customs and Excise Act, 1952.[1]

[Reported by Grove Hull, Esq., Barrister-at-Law.]

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[1] Customs and Excise Act, 1952, s. 257: "(1) If by virtue of any "provision of this or any other Act "or under any practice whereby— "(*a*) goods chargeable with a duty "of customs are allowed to be "delivered without payment of that "duty on condition that they will not "be sold or will be re-exported or "upon any other like condition; or "(*b*) the amount of customs duty "payable on any goods depends on "their being imported on any such "condition, any goods are allowed to "be delivered without payment of "duty or on payment of duty calculated in accordance with that provision or practice, and the condition "is not observed, the goods shall, "unless the non-observance was sanctioned by the Commissioners, be "liable to forfeiture. (2) The provisions of this section shall apply "whether or not any undertaking "or security has been given for the "observance of the condition or for "the payment of the duty payable "apart therefrom, and the forfeiture "of any goods under this section shall "not affect any liability of any person who has given any such undertaking or security."

S. 304: "Without prejudice to any "other provision of this Act, if any

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He was convicted upon both charges and fined. On appeal, it was contended on his behalf, inter alia, that section 257 of the Customs and Excise Act, 1952,[1] was applicable and provided the only consequence of misuse of the goods, namely, forfeiture, and that in consequence section 304 of the Act did not apply:—

Held, (1) that having regard to the opening words of section 304 of the Act, "without prejudice to any other provision of this Act," it was open to the respondent to charge the appellant under that section.

(2) That the substitution in the Act of 1952 of the expression "chargeable with a duty which has not been paid" did not affect the principle of the earlier decisions upon the meaning of the word "uncustomed" and, applying that principle, the goods which the appellant kept or dealt with were chargeable with duty since he was a person not privileged under the agreement to receive them duty-free.

M'Queen v. *M'Cann,* 1945 S.C.(J.) 151 applied.

(3) That the appellant's conduct clearly amounted to "dealing "with" the 2,420 cigars and that there was ample evidence to show intent to defraud.

Rex v. *Cohen* [1951] 1 K.B. 505; [1951] 1 T.L.R. 251; [1951] 1 All E.R. 203 applied.

CASE STATED by a stipendiary magistrate.

On December 31, 1958, the respondent, on officer of customs and excise, laid informations against the appellant, Bernard Schneider, as follows: (1) That he on December 5, 1958, at 37, Cephas Avenue, E.1, knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in keeping certain goods, namely, 45 foreign manufactured cigars and four bottles of spirits, which were chargeable with a duty which had not been paid; (2) that he, on December 5, 1958, in Spelman Street, E.1, knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in dealing with certain goods, namely, 2,420 cigars, which were chargeable with a duty which had not been paid; in each case contrary to section 304 of the Customs and Excise Act, 1952.

The magistrate heard the charges on January 5, 24 and 31, 1959, and found the following facts: (a) No duty had been paid on any of the goods. (b) The goods had been admitted into the United Kingdom free of duty for the use of the United States armed

"person—(*a*) knowingly and with "intent to defraud Her Majesty of "any duty payable thereon, . . . is "in any way concerned in . . . keeping or concealing or in any manner "dealing with any goods . . . which "are chargeable with a duty which "has not been paid, . . . he . . . "shall be liable to a penalty of three "times the value of the goods or one "hundred pounds, whichever is the "greater, or to imprisonment for a "term not exceeding two years, or to "both."

forces under an agreement between the British and American Governments. (The agreement was not produced and the magistrate refused to admit oral evidence of its contents.) (c) The appellant carried on business as a dress manufacturer at a small factory or workshop on the top floor of premises at 6, Spelman Street, and lived at 37, Cephas Avenue. (d) The bottles of spirits referred to in the first information were bought by the appellant from an American serviceman with whom he was friendly, in the course of social visits by the serviceman to the appellant's home, and were found at the appellant's home. (e) The 45 cigars referred to in the first information were bought by the appellant from a second American serviceman, one "Hyme," and were found at the appellant's home. (f) The appellant obtained the 2,420 cigars referred to in the second information from Hyme. Having inquired as to the possibility of acquiring one or two further boxes of cigars, the appellant met Hyme by appointment in the street, and Hyme asked him to look after the 2,420 cigars. The appellant agreed and the cigars were then transferred from the car in which Hyme had brought them to the appellant's car. It was arranged that the appellant should extract whatever number of cigars he required, and that Hyme should call for the remainder, which he told the appellant he intended to sell. The appellant later took all the cigars to 6, Spelman Street and put them in his workshop there. He extracted 100 cigars, intending to give them to a customer as a Christmas present, but was unsuccessful in finding the customer and returned with the cigars to 6, Spelman Street, where he was arrested.

The appellant, in answer to questions put to him at the hearing, admitted that he knew that the American servicemen received imported spirits and cigars, and that these goods could be bought from them more cheaply than elsewhere because they had not borne duty. He further admitted that he knew that the servicemen were not supposed to sell them, but said that he thought it would be quite legal if they did.

It was contended on behalf of the appellant: (1) that the respondent had failed to establish that duty was payable on the goods at the time when the appellant was concerned in keeping or dealing with them; (2) that the respondent had failed to prove that the appellant knew that the goods were chargeable with duty; (3) that the appellant's conduct in relation to the 2,420 cigars did not amount to "dealing with" them; and (4) that the prosecution had failed to establish an intent to defraud.

On behalf of the respondent it was contended: (1) that the quantity of cigars involved in the second charge showed that Hyme did not intend to smoke them himself; that it was a reasonable inference that the goods were to be sold, if not by the appellant then by Hyme, and that, therefore, the cigars were being dealt with in an unauthorised manner and the appellant was concerned in so dealing with them; (2) that the words in section 304 of the Act, " in any manner dealing with," were wide enough to cover the appellant's acts of taking and looking after goods of another person in the circumstances established; and (3) that the expression in section 304 of the Act " goods . . . which are chargeable with a duty which has not been paid " had the same meaning as the expression " uncustomed goods " in section 186 of the Customs Consolidation Act, 1876.

The magistrate was of opinion that in the case of each charge the prosecution had proved that the goods were chargeable with duty, and that the appellant knew that they were so chargeable; that the facts amounted to a " dealing with " the cigars, the subject of the second charge; and that in each case the appellant intended to defraud Her Majesty of the duty payable on the goods. He accordingly convicted the appellant upon both informations, and imposed fines.

John Hall for the appellant. First, no offence was established under either information unless it was established that duty was payable on the goods at the time of the acts complained of—" keeping " and " dealing with " respectively. Save where the provisions of section 290 (2) (*a*) of the Customs and Excise Act, 1952, apply, the burden of proving this and the other ingredients of the charges rests on the prosecution—and in the present case that paragraph is not applicable. The question whether goods are chargeable with duty is a question of fact in each particular case and depends upon the circumstances in which the goods were imported. The prosecution failed to prove that the goods were so chargeable.

If, however, these goods were prima facie chargeable with duty from the moment they reached the shores of this country, then clearly they must have been admitted under a condition of the sort referred to in section 257 of the Act. No evidence was given of the condition under which they were so imported. In order to prove an offence by the appellant the prosecution had first to prove a breach of the condition under which the goods were imported, and since no evidence as to what that condition was was before the court, it follows that the court had no material

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upon which it could decide that the condition had been broken. There was, therefore, no proof that duty had become payable on the goods. Section 257 provides for forfeiture and not for a penalty upon the importer, and this suggests that Parliament could not have intended that the penalties in section 304 should extend to the breach of a condition of the sort referred to in the earlier section. [Reference was made to *M'Queen* v. *M'Cann*[2] and *Attorney-General* v. *Thornton*.[3]] Section 257 is a new section and did not exist at the time of the decision in *M'Queen's* case.[4] *Thornton's* case[5] is to be distinguished; it was a case of an ambassador, with a very special privilege, doing something outside the permission given to him. In the present case there was no proof of any condition or its breach.

[ASHWORTH J. If the cigars are all smoked, is there to be no penalty?]

No.

Secondly, if duty had become payable, there is no finding that the appellant knew that it was payable at the relevant time. At their highest, the findings show that the appellant knew that the American servicemen were bound by the rules of their own service not to sell these goods.

Thirdly, the appellant had only custody of the 2,420 cigars, which remained the property of Hyme. Even if the submissions already made fail, this means that duty could not have been payable on these goods at the relevant time, and that the appellant's conduct could not amount to " dealing with " them. There is a finding that the appellant only intended to keep 100 of these cigars, and thus he was only keeping the balance of 2,320 for Hyme, who never parted with possession of or the property in them.

J. R. Cumming-Bruce for the respondent. Whether goods are subject to duty is a question of law which depends upon the terms of the Finance Acts specifying what descriptions of goods are subject to duty. When goods of such a description are found in the possession of a defendant the statutory presumption is that duty is payable on them, and the onus is on the defendant to show that he comes within some exception. Here the appellant would evidently have to establish that he held the goods upon a condition such as is referred to in section 257.

With regard to the 2,420 cigars which Hyme parted with, the submission that no duty was chargeable upon them until they were sold is incorrect. The arrangement made is that United States servicemen may be in possession of uncustomed goods for their own use. It is found that when Hyme transferred possession of these cigars to the appellant he informed him that this was the first stage of a transaction of selling them. This transaction, quoad the appellant, was a sale or return bargain, which had passed the preparatory stage. Hyme had, to the knowledge of the appellant, ceased to deal with these goods for his own personal use and, therefore, any arrangement made with the customs and excise authorities must have ceased to operate.

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[2] 1945 S.C.(J.) 151.

[3] (1824) M'Cle. 600.

[4] 1945 S.C.(J.) 151.

[5] M'Cle. 600.

The prosecution must prove that the appellant acted fraudulently and with knowledge that duty was chargeable, but evidence of these matters may be drawn from the whole transaction, and an inference can be drawn as to what the appellant, as a reasonable man, must have known.

The reason for the enactment of section 257 is that the Act deals with the machinery of collection. Section 44 provides for forfeiture of goods which have been improperly imported. It was necessary to supplement it with another section to provide for forfeiture where goods have been admitted upon a condition subsequently broken. Section 44 is not exclusive of the infliction of a penalty under section 304, and neither is section 257.

[Reference was made to *Rex* v. *Cohen*[6] and *Sayce* v. *Coupe*.[7]]

[LORD PARKER C.J. There is a difference between the wording of section 304 of the Act of 1952 and section 186 of the Customs Consolidation Act, 1876. Section 304 speaks of knowingly dealing with goods which are chargeable with a duty. That does not mean dealing with goods of a class which is dutiable. Before the onus can rest on the appellant the prosecution must show that the goods have passed the stage of being dutiable and have reached the stage of being chargeable.]

The goods were not chargeable while in the possession of the servicemen. There was here ample evidence on which the magistrate could find that the goods had become chargeable and that the appellant knew it. With respect to the 2,420 cigars, they became chargeable with duty at the moment they were handed over, and the appellant knew it, as could be seen by the furtive nature of the deal.

John Hall in reply. Section 44 provides for forfeiture of goods improperly imported. Section 45 provides a penalty for such conduct. If section 257 is complementary to section 44, where is the corresponding section which is complementary to section 45? If Parliament had intended to impose penalties in addition to forfeiture for breach of a condition of duty-free importation, it is extraordinary that no section should have done so expressly, when this was considered necessary in the case of improper importation. *Rex* v. *Cohen*[8] was a decision on the wording of the Act of 1876, and should not be followed.

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[6] [1951] 1 K.B. 505; [1951] 1 T.L.R. 251; [1951] 1 All E.R. 203.

[7] [1953] 1 Q.B. 1; [1952] 2 T.L.R. 664; [1952] 2 All E.R. 715.

Cur. adv. vult.

October 22. ASHWORTH J. read the following judgment of the court. This is an appeal by way of case stated from a decision of Mr. Geraint Rees, one of the metropolitan magistrates, before whom the appellant was charged in respect of two offences under section 304 of the Customs and Excise Act, 1952. In the first charge it was alleged that at his house at 37, Cephas Avenue, E.1, he knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in keeping certain goods, namely, 45 cigars and four bottles of spirits, which were chargeable with a duty which had not been paid. In the second charge it was alleged that in Spelman Street, E.1, where his business premises were situate, he knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in dealing with certain goods, namely, 2,420 cigars, which were chargeable with a duty which had not been paid.

[His Lordship stated the facts and continued:] This is not the first case in which this court has had to consider the effect in regard to customs duty of a sale or disposal by an American serviceman of goods which have been imported into the United Kingdom duty free for the use of American forces stationed here. As Lord Goddard C.J. said in *Sayce* v. *Coupe*[1]: "The importance of the case is this: it is well known that at the present "time when large numbers of American soldiers and airmen are "in this country, by an arrangement which Her Majesty's "Government have made with the American Government, "dutiable articles are allowed to be imported into this country "for the use of the American troops without payment of duty. "The result is that there are a good many sales of duty-free "articles taking place surreptitiously, . . . with the consequence

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[8] [1951] 1 K.B. 505.

[1] [1953] 1 Q.B. 1, 5; [1952] 2 T.L.R. 664; [1952] 2 All E.R. 715.

"that this country loses the benefit of the customs duty "payable, . . ."

In the course of his able argument on behalf of the appellant Mr. Hall contended that if goods, which have been imported duty-free for the use of American troops, are used for some other purpose, if, for example, they are sold to members of the public, section 257 of the Customs and Excise Act, 1952, is applicable and provides the only consequence of such misuse, namely, forfeiture of the goods. [His Lordship read section 257 (1) of the Act and continued:] It is to be noted that by way of contrast to sections 44 and 45 of the Act section 257 is not followed by a section providing for a penalty in the event of such misuse of goods imported duty-free as is alleged in the present case. Moreover, section 257 does not contain any words referring to other possible consequences apart from forfeiture of the goods, and, indeed, in subsection (2) care has been taken to preserve the liability of any person who has given an undertaking or security for the observance of the condition upon which the goods have been admitted into the country duty-free. In our judgment, however, this argument is met by the opening words of section 304 under which the appellant was charged: "Without prejudice "to any other provision of this Act . . ." Further, we should have been surprised if the consequences of misuse were limited to forfeiture of the goods, since in many cases the goods would have been consumed before steps could be taken to forfeit them. On this point, therefore, we are of opinion that it was open to the respondent to charge the appellant under section 304, notwithstanding the provisions of section 257.

Mr. Hall also contended that it was incumbent upon the prosecution to establish that duty was payable and had not been paid at the time when the appellant was concerned in keeping or dealing with the goods, and that this onus had not been discharged. So far as actual payment of duty is concerned, it is found as a fact that no duty had been paid on any of the goods the subject of the charges, and that finding was not contested. The question whether at the material times duty had become payable is more difficult. In *M'Queen* v. *M'Cann*[2] the word "uncustomed" in section 186 of the Customs Consolidation Act, 1876, was being considered in relation to facts not unlike those in the present case, and Lord Normand, then Lord Justice-General, said[3]: "There might have been a considerable difficulty about

[2] 1945 S.C.(J.) 151.

[3] Ibid. 153.

"the construction of the word 'uncustomed' were it not for the "decision in *Attorney-General* v. *Thornton*[4] that wines, which "were a dutiable commodity but which had been brought into "the country free of duty for the use of an ambassador and his "family, must, when afterwards sold, bear the appropriate duty, "and that the auctioneer was bound to pay such duty out of the "proceeds of their sale. The ground of the judgment is that "duties attach to goods brought into the country and that, though "the duty is not paid at the moment of bringing in because they "are by special arrangement allowed to come in free of duty, "the duty is leviable later when the commodities pass into other "than the privileged person's hands." The principle of that decision was applied in *Sayce* v. *Coupe*.[5] It is true that since January 1, 1953, the Act of 1952 has become applicable and that in section 304 the expression "chargeable with a duty which has "not been paid" has been substituted for the word "uncustomed," but in our judgment the alteration in wording has not affected the principle of the earlier decisions.

So far as the first charge is concerned, which relates to spirits and cigars admittedly bought by the appellant from American servicemen, we are of opinion that at the material time duty had clearly become payable. In the second charge the appellant was alleged to have been concerned in dealing with 2,420 cigars, of which he only bought 100. The circumstances in which the full quantity of 2,420 cigars came into the appellant's possession have already been described, and it is enough for us to hold that at least when the appellant put the cigars into his car, upon the footing that he could buy as many as he wanted and return the balance, the privilege under which the cigars were not dutiable ceased to apply and the goods became chargeable to duty. It was also argued that what the appellant did in relation to the goods did not amount to "dealing with" them within the meaning of section 304. The relevant words are very wide, "in any "manner dealing with," and without attempting any precise definition of their meaning we are of opinion that the appellant's conduct clearly fell within them.

Mr. Hall further contended that, assuming the goods to have become dutiable, there was no finding that the appellant knew that duty was payable, and accordingly the charges ought to have been dismissed. It is true that there is no such finding in the second paragraph of the case stated, where such a finding might have been expected, but in the sixth paragraph the learned magistrate in stating his opinion says in terms: "In the case of each "charge the appellant knew that the goods were chargeable with "duty," and in our opinion the evidence before him was quite sufficient to enable him to take that view. In regard to the point that no intent to defraud was proved, the principle laid down in *Rex* v. *Cohen*[6] is applicable, and in our view there was ample evidence to show such intent.

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[4] (1824) M'Cle. 600.

[5] [1953] 1 Q.B. 1.

For these reasons we are of opinion that the magistrate came to a correct conclusion, and this appeal is accordingly dismissed.

Appeal dismissed with costs.

Solicitors: *Judge & Priestley; Solicitor, H.M. Customs and Excise.*

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[6] [1951] 1 K.B. 505; [1951] 1 T.L.R. 251; [1951] 1 All E.R. 203.

COMPAGNIE ALGERIENNE DE MEUNERIE *v.* KATANA SOCIETA DI NAVIGATIONE MARITTIMA, S.P.A.

C. A.

1959
Nov. 17, 18, 19.
1960
Feb. 29.

Hodson and Ormerod L.JJ.; Gorman J.

Contract—Implied term—Performance dependent on permission of third party—Obtaining of permission solely within power of promisor—Knowledge of parties at time of contract that permission might be needed—Whether warranty by promisor to be implied.

Shipping—Charterparty—Implied term—Vessel chartered to load goods from Syrian port and proceed to Algeria—Vessel required special permission to load—Not within knowledge of charterers—Syrian authorities prohibited export of grain to Algeria—Whether term as to obtaining permission to be implied—Time within which to be obtained.

Shipping—Seaworthiness—Charterparty—Approach voyage—Whether term as to seaworthiness to be implied.

Ships' Names—The Nizetti.

On September 23, 1954, the Syrian legislature, by decree, made certain provisions prohibiting trade with Israel, and as a result, vessels which had called at Israeli ports were refused permission to anchor at Syrian ports, although such permission might be granted if their owners offered sufficient guarantees to the authorities against non-repetition of infringements of the boycotting provisions.

By a charterparty dated May 17, 1956, it was agreed that the *S.S. Nizetti* should "proceed to Lattakia [Syria] or so near as she "may safely get" and load a full cargo of wheat and then "proceed to one or two ports in charterers' option out of Philippe-"ville, Alger or Oran." The ship was stated to be "now trading and "expected ready to load under this charter about May 24, 1956."

During February, 1955, the *Nizetti* had discharged cargo at Haifa, Israel. Thereafter she passed through the Suez Canal four times and on each occasion the master signed a declaration of future non-co-operation with Israel. At the date of the charterparty the shipowners knew that the *Nizetti* had called at Haifa and that the master had made declarations of future non-co-operation with Israel, but the charterers neither knew nor ought to have known that.

The *Nizetti* arrived at Lattakia under the charterparty on May 28, 1956, but was refused free pratique. On May 30, the master made a declaration of non-co-operation with Israel, but was still refused permission to load. On June 2, the Syrian authorities prohibited the export of grain to Algeria as from June 3. On June 5 the *Nizetti* sailed from Lattakia without having loaded. The charterers claimed damages alleging breach of the charterparty.

The trial judge held (inter alia) that since it lay solely within the power of the owners, and outside the power of the charterers, to obtain the permission to load, a term had to be implied in the charterparty to give business efficacy to the contract that the shipowners would at least exercise reasonable diligence to obtain the permission; and further that, since the owners knew, and the charterers neither knew nor ought to have known, that at the date of the charterparty that permission might be needed, there was an implied warranty by the shipowners not only that they would use due diligence to obtain, but that they would in fact obtain, whatever permission was necessary within a reasonable time, but that such reasonable time had not expired when this embargo took effect on June 3, 1956.

On appeal from that decision:—

Held, (1) that the implied warranty of seaworthiness did not operate on the approach voyage, and it never attached at all under this charterparty (post, pp. 126, 129, 130, 131, 132).

Cohn v. *Davidson* (1877) 2 Q.B.D. 455 and *A. E. Reed & Co. Ltd.* v. *Page, Son & East Ltd.* [1927] 1 K.B. 743; 43 T.L.R. 272, C.A. applied.

(2) That the obligation to carry out the approach voyage with reasonable dispatch was performed (post, pp. 126, 130, 132).

(3) That the warranty sought to be implied by the judge was erroneous in principle, since it could not be said in the circumstances that both parties must have intended that it should be a term, or inferred what their attitude might have been had they known all the facts (post, pp. 127, 130, 131).

Per Hodson L.J. There was no necessity for the additional warranty implied by the judge in order to give business efficacy to the contract, the warranty "expected ready to load" was sufficient (post, p. 126).

Per Ormerod L.J. That had such a warranty been implied there would not have been a breach of it by the time the charterparty was frustrated on June 5, 1956 (post, p. 131).

Comptoir Commercial Anversois v. *Power, Son & Co.* [1920] 1 K.B. 868, C.A. applied.

Decision of Diplock J. [1959] 1 Q.B. 527; [1959] 2 W.L.R. 366; [1959] 1 All E.R. 272 affirmed for different reasons.

APPEAL from Diplock J.

The following statement of facts is taken substantially from the judgment of Hodson L.J.: The charterers, Compagnie Algerienne de Meunerie, by a charterparty in the "Gencon" form, dated May 17, 1956, chartered from the shipowners, Katana Societa di Navigatione Marittima, S.P.A., the Italian *S.S. Nizetti*, stated to be "now trading and expected ready to load under this "charter about May 24, 1956." It was agreed "that the said "vessel shall proceed to Lattakia [Syria] or so near thereto as she "may safely get and lie always afloat and there load a full and "complete cargo of 2,750 (two thousand seven hundred and fifty) "metric tons, 5 per cent. more or less, quantity in master's option "to be declared on giving notice to shippers. Wheat in bulk, "charterers to supply up to 5 per cent. of bagged cargo, as "demanded by the master for safe stowage . . . and being so "loaded the vessel shall proceed to one or two ports in charterers' "option out of Philippeville, Alger or Oran."

Clause 11 provided: "Laydays not to commence before "May 24 and should the vessel not be ready to load (whether in "berth or not) on or before May 31, 1956, charterers have the "option of cancelling this contract, such option to be declared, if "demanded, at least 48 hours before vessel's expected arrival at "port of loading . . ."

On November 23, 1954, in pursuance of the boycott of Israel by Arab States, the Republic of Syria, by legislative decree, decreed that foreign vessels should not be allowed to anchor in Syrian ports if they had previously called at an Israeli port, but there was a discretion to remove the ban if owners of such vessels promised not to co-operate in future with Israel.

The charterers had simultaneously with the charterparty made a contract of sale with a French Government organisation which controlled the import of grain into French North Africa, and to fulfil this contract they had made a contract with a grain supplier in Beirut to purchase at Lattakia 5,000 tons of Syrian grain, 2,750 tons of which was to be shipped on the *Nizetti*.

In February, 1955, the *Nizetti* had discharged at Haifa in Israel. Between February, 1955, and May, 1956, she had passed four times through the Suez Canal, and on each occasion the master had signed a declaration of future non-co-operation with Israel. The vessel was not substantially delayed on any of those occasions. Of those matters, within the owners' knowledge, the charterers did not know at the date of the charterparty.

The vessel anchored in the roads at Lattakia at noon on May 28, 1956, and moved to a closer anchorage at 1500 hours the same day. After she had moved, her log book was seen by a Syrian police officer and the master was told that free pratique would not be granted.

On May 29, 1956, the charterers heard of the trouble and informed the owners, who cabled the master giving him instructions to sign a declaration of future non-co-operation with Israel. The master, being forbidden to land, did not receive the cable till the next day, May 30, 1956, and was never given free pratique. On May 30, 1956, he was permitted to land, received the cable and made the necessary declaration.

The Syrian Government had been considering the prohibition of the export of grain to French North Africa, and in the latter part of May 29, 1956, they imposed an embargo. This was released on May 31, 1956, in respect only of vessels which had already begun to load. On June 2, 1956, the government imposed a total and final embargo which took effect from June 3, 1956. On June 5, 1956, the vessel sailed from Lattakia without having loaded anything. The charterers had had their cargo ready to load on May 28, 1956, when the vessel arrived off Lattakia.

The charterers claimed damages for breach of the charterparty, their claim being for the loss of profit on the transaction to purchase grain for shipment to North Africa, and for the loss of the money which they had been required to deposit in North Africa which had been forfeited on non-fulfilment of that contract.

On a special case under section 21 (1) (*b*) of the Arbitration Act, 1950, Diplock J.,[1] reversing the decision of the umpire, held that the charterers had failed to establish any breach of warranty on the part of the shipowners before the charterparty was frustrated on June 3 by the embargo.

The charterers appealed from that decision. The findings of the umpire are set out in the report of the hearing before Diplock J.,[2] and the ratio decidendi of Diplock J. is referred to in the judgment of Hodson L.J.

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[1] [1959] 1 Q.B. 527; [1959] 2 W.L.R. 366; [1959] 1 All E.R. 272.

[2] [1959] 1 Q.B. 529 et seq.

John Megaw Q.C. and *R. A. MacCrindle* for the charterers. The charterers claim that had it not been for the defect in the *Nizetti* which was not known to them at the time of the charter —i.e., that having called at an Israeli port she could not load at Lattakia without special licence from the Syrian authorities—the vessel would in the normal course of events have begun loading according to the contract before the temporary embargo was proclaimed, and continued loading during the relaxed period from May 31 to June 2, and thus completed loading before the final embargo took effect on June 3. Because of that defect, which would not have existed in a normal vessel, the *Nizetti* was unfit for the voyage which was foredoomed to failure at the outset: *Ciampa* v. *British India Steam Navigation Co. Ltd.*[3]

There was no express warranty of seaworthiness in the charterparty, but there is an implied warranty of seaworthiness in all contracts of carriage by sea in the absence of express stipulation to the contrary: *Kopitoff* v. *Wilson.*[4] Seaworthiness extends beyond the mere physical condition of a vessel, and the implied warranty of seaworthiness is no less strict. The implied warranty extends not only to the carrying voyage but also the preliminary or approach voyage and, indeed, to all operations leading up to and including loading: *A. E. Reed & Co. Ltd.* v. *Page, Son & East Ltd.*[5]; *New York and Cuba Mail S.S. Co.* v. *Eriksen and Christensen*[6]; *Monroe Bros. Ltd.* v. *Ryan.*[7] The defect in the *Nizetti* was a breach of that implied warranty, it was a fault not found in normal vessels, analogous to a defective boiler or the absence of a bill of health: *Levy* v. *Costerton*[8]; *Ciampa* v. *British India Steam Navigation Co. Ltd.*[9] The implied warranty of seaworthiness is the fitness of the vessel for the contemplated voyage, in particular in this case that part of it which involved loading at Lattakia: *Cohn* v. *Davidson.*[10] See also *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.*[11]; *Wilson* v. *Rankin*[12]; *New York and Cuba Mail S.S. Co.* v. *Eriksen and Christensen.*[13]

Secondly, the owners were in breach of the implied warranty that the vessel would proceed with all reasonable dispatch to the place of loading and present herself there ready to load; if as a result of unfitness for the adventure through a defect not found in normal vessels of this class and type (this defect being not known to the charterers) she is delayed or prevented, there is a breach. The mere fact that she met her cancelling date does not mean that the owners used due dispatch. The obligation to use due dispatch is not exhausted when she reaches port; she must load.

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[3] [1915] 2 K.B. 774.

[4] (1876) 1 Q.B.D. 377.

[5] [1927] 1 K.B. 743, 754; 43 T.L.R. 272, C.A.

[6] (1922) 27 Com.Cas. 330.

[7] [1935] 2 K.B. 28; 51 T.L.R. 361, C.A.

[8] (1816) 4 Camp. 389, N.P.

[9] [1915] 2 K.B. 774.

[10] (1877) 2 Q.B.D. 455.

[11] [1959] A.C. 133; [1958] 2 W.L.R. 688; [1958] 1 All E.R. 725, H.L.

[12] (1865) L.R. 1 Q.B. 162.

[13] 27 Com.Cas. 330.

Here the special peculiarity or defect of the *Nizetti* prevented her from proceeding in such manner to the place of loading and put the owners in breach of their implied warranty that the ship should commence and carry out the voyage contracted for with reasonable diligence. [He referred to Carver's Carriage of Goods by Sea, 10th ed., p. 420; Scrutton on Charterparties and Bills of Lading, 16th ed., p. 125; *M'Andrew* v. *Adams* [14]; *Louis Dreyfus & Co.* v. *Lauro*.[15]]

Alternatively, where a contract contains no conditions that its performance is subject to the granting of a licence, and that necessity is known to one party but not to the other, a warranty may be implied that the licence will be obtained: *Peter Cassidy Seed Co. Ltd.* v. *Osuustukkukauppa I. L.*[16] Here, at least, there must be implied a term that the performance will not be delayed by any special defect which was known to the owners but not to the charterers. The position when the vessel went through Suez showed that there would be some delay. *Cunningham* v. *Dunn* [17] is cited against the charterers, but in that case the charterers knew of the defect. Charterers must have cargo ready so that there will be no delay of the vessel before or after arrival; and business efficacy requires there should be no delay due to a special defect of the vessel.

The judge was right in holding that a term should be implied that when the vessel reached Lattakia the owners should not only use due diligence to obtain but would in fact obtain permission to load in a reasonable time, i.e., such time as would not involve frustration of the charter. In cases where export licences are required there is normally an absolute duty to obtain them: *Peter Cassidy Seed Co. Ltd.* v. *Osuustukkukauppa I. L.*[18] Similarly, in the letter of credit cases, where the purchase of goods is financed by a banker's confirmed irrevocable credit, the letter of credit must be established before the first day of shipment period: *Ian Stach Ltd.* v. *Baker Bosley Ltd.*[19]; *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen.*[20]

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[14] (1834) 1 Bing.N.C. 29.

[15] (1938) 60 Ll.L.Rep. 94.

[16] [1957] 1 W.L.R. 273; [1957] 1 All E.R. 484.

[17] (1878) 3 C.P.D. 443, C.A.

[18] [1957] 1 W.L.R. 273.

Although the judge was right in implying that term, it is submitted that he was wrong in holding that a reasonable period had not elapsed by the date of the final embargo; his estimate of a reasonable time was too long: *Evera S.A. Commercial* v. *North Shipping Co. Ltd.*[21] It cannot be assumed that merely because the owners exercise reasonable diligence that that excuses their failure to get a licence, and it is not enough for them to say that they used reasonable diligence; it was their failure to obtain the necessary licence until it was too late to load which was the cause of the vessel sailing without cargo.

If the charterers' contentions are correct, the last question is: What are the damages? The damages claimed are the loss of profit on the transaction to purchase grain for shipment to North Africa, and the loss of the money which they had been required to deposit in North Africa and which had been forfeited when the charterers did not fulfil the contract. It is submitted that the damages claimed are not too remote. The House of Lords has said that where loss of profit is recoverable, the damages that may have to be paid under a sub-contract are also recoverable: *R. & H. Hall Ltd.* v. *W. H. Pim, Junr. & Co. Ltd.*[22] The umpire found that the breach of the charterparty did cause loss of profit and inferentially he found that it was foreseeable: *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[23]

Ashton Roskill Q.C. and *J. F. Donaldson* for the owners. There is no express warranty of seaworthiness in the charterparty. The implied warranty does not attach on the approach voyage or prior to the beginning of loading: *Cohn* v. *Davidson* [24]; *A. E. Reed & Co. Ltd.* v. *Page, Son & East Ltd.*[25]; *New York and Cuba Mail S.S. Co.* v. *Eriksen and Christensen.*[26] The *Nizetti* never started to load and, accordingly, the implied warranty of seaworthiness never attached.

This voyage was not foredoomed to failure, as in the *Ciampa* case.[27] All that had to be done was to get a licence from the Syrian authorities. The master had obtained such licence without trouble on four previous occasions when the ship went through the Suez Canal. There was no reason to expect difficulty on this occasion.

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[19] [1958] 2 Q.B. 130; [1958] 2 W.L.R. 419; [1958] 1 All E.R. 542.

[20] [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492, C.A.

[21] [1956] 2 Ll.L.Rep. 367.

[22] (1928) 30 Ll.L.Rep. 159, H.L.

[23] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997, C.A.

[24] 2 Q.B.D. 455.

[25] [1927] 1 K.B. 743.

[26] 27 Com.Cas. 330.

[27] [1915] 2 K.B. 774.

Knowledge of a defect is immaterial for the purpose of implying a term, although it may be relevant on construction: *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food* [28]; *Cunningham* v. *Dunn*,[29] *per* Bramwell L.J. The charterers are not helped by *Levy* v. *Costerton* [30] because there was an express warranty of seaworthiness in that case.

There was no breach of the express " expected ready to load " obligation, and no finding that the statement in the charterparty was not made honestly on reasonable grounds. The position would have been different if, when made, such statement was not justified by an honest expectation based on reasonable grounds: *Sanday & Co.* v. *Keighley, Maxted & Co.*[31]; *Monroe Bros. Ltd.* v. *Ryan.*[32] On reaching Lattakia the master and owners acted with due diligence in and about the making of the necessary declaration of non-co-operation: *Owners of S.S. Istros* v. *F. W. Dalhstroem & Co.*[33]

The owners do not dispute that there is an implied obligation to proceed with all reasonable dispatch to the place of loading. But reasonable dispatch is not an absolute obligation. It is subject to qualification according to the prevailing circumstances; an occurrence of some delay does not necessarily and did not in this case constitute any breach of this obligation. The court might in the appropriate case find that the delay was such as to frustrate the commercial purpose of the contract. But here the delay was not of this order. The cause of the trouble was not the action of the Syrian authorities in holding the *Nizetti* because she had visited an Israeli port, but the supervening embargo on shipping wheat to North Africa: *White* v. *The Steamship " Winchester "* [34]; *Universal Cargo Carriers Corporation* v. *Citati (No. 2)*.[35] [He also referred to *Royal Greek Government* v. *Ministry of Transport.*[36]]

The requirements of business efficacy do not justify the implication by the judge of the warranty that since the owners knew and the charterers did not know that permission was needed, the owners would not only use reasonable diligence to obtain, but would in fact obtain the permission within a reasonable time. Such implication is erroneous in principle and does not fulfil the test laid down in *Comptoir Commercial Anversois* v. *Power, Son & Co.*[37] It was not so obvious that both parties must have intended its inclusion as a term. It cannot be known what would have been the parties' reaction if they had considered the matter at the time the charterparty was made. The charterers must say that the implied warranty is a warranty that the vessel has never called at an Israeli port.

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[28] [1960] 1 Q.B. 439; [1959] 3 W.L.R. 665; [1959] 3 All E.R. 434.

[29] 3 C.P.D. 443, 447.

[30] 4 Camp. 389.

[31] (1922) 38 T.L.R. 561, C.A.

[32] [1935] 2 K.B. 28.

[33] [1931] 1 K.B. 247.

[34] (1886) 23 Sc.L.R. 342.

[35] [1958] 2 Q.B. 254; [1958] 3 W.L.R. 109; [1958] 2 All E.R. 563, C.A.

[36] (1949) 66 T.L.R. (Pt. 1) 504; 83 Ll.L.Rep. 228.

The "expected ready to load" warranty, coupled with the obligation to proceed with reasonable dispatch, is sufficient for business efficacy, and there is no need for any further implication. If, contrary to this contention, the additional warranty is to be implied, the judge was right in holding that a reasonable time had not expired when the final embargo on shipment was imposed. Reasonable time means time in which the contract is not frustrated *Clipsham* v. *Vertue*[38]; *Stanton* v. *Richardson.*[39]

As to damages, if the charterers are right, they would be entitled as damages to any loss of profit based on the market price less cost and freight, etc. There is, however, the difficulty that there is no finding as to the value of goods in Syria and no award as to the market price: see Scrutton, at p. 439; *Ströms Bruks Atkie Bolag* v. *Hutchison*[40]; *A/SD/S Heimdal* v. *Questier & Co. Ltd.*[41]

Megaw Q.C. in reply. It is of great general importance to learn when the implied obligation of seaworthiness arises: see Scrutton, pp. 101–102. The vessel must be fit as a ship for the perils of the sea, lying afloat in the harbour waiting to sail, and she must be fit as a ship for each stage of her contract adventure which may commence before loading: see *Reed* v. *Page*[42]; *Cohn* v. *Davidson.*[43] There is no decided authority contrary to the charterers' claim.

It was argued that delay was only relevant if the contract was frustrated; that argument confuses breach amounting to repudiation of the contract with breach which merely seeks a remedy in damages. The charterers do not require a warranty that the *Nizetti* had not called at an Israeli port; they rely on a warranty that there would not be delay from this defect of which they were unaware.

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[37] [1920] 1 K.B. 868, C.A.

[38] (1843) 5 Q.B. 265.

[39] (1872) L.R. 7 C.P. 421.

[40] [1905] A.C. 515; 21 T.L.R. 718, H.L.

[41] (1949) 82 Ll.L.Rep. 452.

[42] [1927] 1 K.B. 743.

[43] 2 Q.B.D. 455.

It was also argued that knowledge was irrelevant; but it is particularly relevant on implied terms: *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food.*[44]

As to damages, in the *Ströms Bruks* case[45] the charterers were the owners of the goods; in the present case the charterers were never the owners of the goods; the goods were f.o.b. Lattakia. [He also referred to *The Arpad*[46]; *Watts, Watts & Co.* v. *Mitsui & Co. Ltd.*[47]]

Cur. adv. vult.

Feb. 29. HODSON L.J., having stated the facts as set out above, read the following judgment: The charterers' contention is that, but for the defect of which the owners knew and they did not, the vessel would have gone through to the loading berth on May 28, 1956, in the normal course of events, and would have loaded before the final embargo on June 3, having been stopped from May 29 to 31. It is contended that the defect was one which put the owners in breach of their implied warranty of seaworthiness; alternatively, in breach of their implied warranty that the ship shall commence and carry out the voyage contracted for with reasonable diligence; these two undertakings being implied in all contracts of carriage by sea in the absence of express stipulation to the contrary.

The judge rejected these submissions but held that, since it lay solely within the power of the owners and outside the power of the charterers to obtain the permission to load, a term must be implied in the charterparty to give business efficacy to the contract that the shipowners would at least exercise reasonable diligence to obtain the permission. He further held that, since the owners knew, and the charterers neither knew nor ought to have known, at the date of the charterparty that permission might be needed, there was an implied warranty by the shipowners not only that they would use due diligence to obtain, but that they would in fact obtain, whatever permission was necessary within a reasonable time, and decided that such reasonable time had not expired when this embargo took effect on June 3. Accordingly, he held that the charterers had failed to establish any breach of warranty on the part of the owners before the charterparty was frustrated on June 3 by the embargo. The charterers maintain that the term implied by the judge is not stringent enough. The owners, while content to accept the finding in their favour, contend that in any event no special warranty should be implied, for the situation was covered by the obligation of the owners to provide the vessel "expected ready to load . . . about May 24, 1956," and by the undertaking admittedly implied to carry out the voyage with reasonable diligence.

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[44] [1960] 1 Q.B. 439.

[45] [1905] A.C. 515.

[46] [1934] P. 189; 50 T.L.R. 505, C.A.

[47] [1917] A.C. 227, H.L.

So far as seaworthiness is concerned, the contention is that this is a case of a vessel suffering from a fault not found in normal vessels analogous to a defective boiler which made her unfit for the voyage. Comparison was made with *Levy* v. *Costerton.*[1] There, a ship was stipulated "being tight, staunch, and strong, "and well and sufficiently manned, tackled, apparelled and furnished with everything needful and necessary for . . . the "voyage." It was held that a bill of health was a thing within the meaning of that covenant, and that the shipowners were in breach of that covenant having performed the voyage with some delay consequent upon the absence of a bill of health.

Reliance is also placed on *Ciampa* v. *British India Steam Navigation Co. Ltd.*,[2] where it was held that the ordinary perils to which cargo may be exposed may include such treatment of the ship and cargo (for example, fumigation) as by the local laws of a port of call the cargo shipped may be exposed to. In that case the ship, to the knowledge of the owners but not of the charterers, was foredoomed to inability to carry the contractual cargo and the vessel was held to have been unseaworthy when she took on her cargo of lemons at Naples.

This is an entirely different case and compares rather with *Cunningham* v. *Dunn*,[3] where the facts were not dissimilar, and Bramwell L.J. said[4]: "However, the counsel for the plaintiff "contended, that the charterparty contained an implied warranty "that the ship should be presented to the plaintiff in such plight "and condition that she might lawfully take on board the "proffered cargo. I know of no authority supporting such a "proposition."

It cannot be said on the facts of this case that, as in *Ciampa* v. *British India Steam Navigation Co. Ltd.*,[5] the voyage was foredoomed to failure by reason of any lack of seaworthiness. In any event this warranty would not avail the charterers since there is

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[1] (1816) 4 Camp. 389, N.P.

[2] [1915] 2 K.B. 774.

[3] (1878) 3 C.P.D. 443, C.A.

[4] Ibid. 447.

[5] [1915] 2 K.B. 774.

C. A.

1960

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no express warranty, and the implied warranty according to the authorities attaches not on the approach voyage but when the vessel sails with her cargo. See *Cohn* v. *Davidson*[6] and the judgment of Scrutton L.J. in *A. E. Reed & Co. Ltd.* v. *Page, Son & East Ltd.*[7] as to various stages of a voyage. The time of sailing with the cargo was never reached.

So far as the undertaking to carry out the voyage with reasonable dispatch is concerned, that obligation was performed. She was never an arrived ship, and all her approach voyage was carried out with reasonable diligence. A short measure of delay may be involved in the situation where a master had to make a declaration of non-co-operation before being allowed to load, but it is not true to say that the voyage was foredoomed to failure. It would be otherwise if the delay involved up to the time the vessel became an arrived ship were so great as to defeat the commercial purpose of the voyage.

There remains the express obligation contained in the words "expected ready to load." If this statement is not made honestly and on reasonable grounds, the charterer has his remedy: see *Sanday & Co.* v. *Keighley, Maxted & Co.*,[8] per Lord Sterndale M.R., and *Monroe Bros. Ltd.* v. *Ryan*.[9] The case was not presented as one in which there was a breach of this obligation, no doubt because the master had had no serious trouble before having made, and had accepted, declarations of non-co-operation with Israel. Accordingly, the expectation of the owners was honestly held and based on reasonable grounds. If, on the other hand, there had been serious trouble and delay on earlier occasions by reason of the obstruction of the Syrian authorities, this factor could not have been ignored, and the "expected" date would not have been given on reasonable grounds.

There is no business necessity, in my judgment, for such an additional warranty as that implied by the judge. The obligation "expected ready to load" is sufficient for business efficacy. The implied warranties as set out in Scrutton on Charterparties and Bills of Lading (11th ed., at p. 95) have stood for many years, and it must be rarely necessary for any further implication to be made.

It is said that the necessity for the implication arises from the knowledge of the owners denied to the charterers as to the defect of their ship. No doubt knowledge as a surrounding circumstance is an aid to construction, but I do not see how the knowledge can assist to imply a term of the kind which the judge thought necessary, since it is impossible to say what action they would have taken if they had known of the defect. The shipowners would, no doubt, say they had never had any trouble, and the charterers might have accepted the risk.

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[6] (1877) 2 Q.B.D. 455.

[7] [1927] 1 K.B. 743, 754; 43 T.L.R. 272, C.A.

[8] (1922) 38 T.L.R. 561, C.A.

[9] [1935] 2 K.B. 28; 51 T.L.R. 361, C.A.

The warranty sought to be implied amounts to an implied warranty that the ship had never called at an Israeli port. If it is put in this way I think the owners' submission is right that the implication is erroneous in principle. In the language of Scrutton L.J. in *Comptoir Commercial Anversois* v. *Power, Son & Co.*[10]: " . . . it must be such a necessary term that both parties "must have intended that it should be a term of the contract "and have only not expressed it because its necessity was so "obvious that it was taken for granted." The warranty sought to be implied does not, in my judgment, pass the test.

It was found by the umpire that the owners made their declaration of non-co-operation within a reasonable time. He found, in effect, that if the *Nizetti* had been allowed to load on arrival it would have been stopped by the temporary embargo late on May 29, and loading would have been resumed on May 31 when the temporary embargo was lifted from the ships which had begun to load before the temporary embargo was imposed. In that event she could, on his findings, have loaded a full cargo before the final embargo was imposed. On these findings, it was the embargo which frustrated the contract between the parties and there was no breach by the owners, for, but for the embargo, the Syrian authorities would have allowed the vessel to load within such time as would not have frustrated the contract.

I would dismiss the appeal.

Ormerod L.J. The judge in his judgment says[11]: "The "question, therefore, is whether at any time before the beginning "of June 3, 1956, the owners were guilty of any breach of war-"ranty and, if so, what damage did that breach cause." To answer this question involves consideration of the obligations, express and implied, imposed on the owners by the charterparty. There was in the first place the obligation contained in the words "now trading and expected ready to load under this charter about "May 24, 1956." It was not contended by the appellants that there had been a breach of this warranty. The *Nizetti* had discharged cargo at the Israeli port of Haifa in February, 1955, but on four subsequent occasions between that date and May, 1956, she had passed through the Suez Canal. Each time the master had signed a declaration of non-co-operation with Israel and the ship had been allowed to proceed on her voyage without any substantial delay. It was reasonable to expect, therefore, that there would be no delay from this cause in carrying out the proposed voyage, and that the expectation was "one made "honestly and upon reasonable grounds": see *Sanday & Co.* v. *Keighley, Maxted & Co.*[12]

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[10] [1920] 1 K.B. 868, 899, C.A.

[11] [1959] 1 Q.B. 527, 539; [1959] 2 W.L.R. 366; [1959] 1 All E.R. 272.

There was no express warranty of seaworthiness in the charterparty. In the circumstances there was an implied warranty of seaworthiness, and in addition an implied warranty that the ship would commence and carry out the voyage contracted for with reasonable diligence. The judge, however, was of the opinion that there should be implied into the charterparty a further warranty. He says [13]: "In the absence of such knowledge [that "is, that the *Nizetti* had called at an Israeli port] on the part of "the charterers at the time the charterparty was entered into, "I am prepared to hold, although I do not think that any of the "cases cited really assists me in this, that there was an implied "warranty by the shipowners not merely that they would use due "diligence to obtain, but that they would in fact obtain whatever "permissions to carry cargoes were necessary under the Syrian "Law of 1954." And then, after considering the time factor, he went on to say [14]: "It seems to me that the highest at which "the warranty on the part of a shipowner may be put is that he "will (a) exercise due diligence to obtain, and (b) will in fact "obtain, within a reasonable time, any permission to load the "vessel which is required under the Syrian law in force at the "time when the charterparty was entered into." The judge held that there had been no breach of this warranty up to the time when the contract became impossible of performance because of the embargo imposed by the Syrian authorities, as a reasonable time had not expired and the owners were therefore entitled to succeed.

It was contended on behalf of the charterers that there was an implied warranty of seaworthiness in relation to a vessel proceeding to the port of loading. This contention, however, is not in accordance with the authorities. Seaworthiness is well understood to mean the measure of fitness which the particular voyage or particular stage of the voyage requires: see *Cohn* v. *Davidson*,[15] where it was held that the implied warranty of seaworthiness attaches at a time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her destination. Field J. said: "Now nothing can be clearer than "that upon such a policy [the ordinary marine policy] the warranty of seaworthiness for the voyage . . . is a warranty that "the ship is or shall be seaworthy for the voyage at the time of "sailing on it."

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[12] 38 T.L.R. 561.

[13] [1959] 1 Q.B. 540.

[14] Ibid. 540, 541.

[15] 2 Q.B.D. 455, 461.

In *A. E. Reed & Co. Ltd.* v. *Page, Son & East Ltd.*[16] Scrutton L.J. said: " . . . she need not be fit for the voyage before it "commences, and when she is loading in port."

It seems clear from these and other authorities which were cited to us that in the absence of express warranty of seaworthiness there is an implied warranty which does not come into operation until the vessel sets sail on her voyage. Seaworthiness, of course, means more than that the ship is "tight, staunch and "strong." It means that she must be fitted with everything necessary for the intended voyage and to carry the specified cargo or cargoes. In *Levy* v. *Costerton* [17] a ship was warranted "being "tight, staunch, and strong, and well and sufficiently manned, "tackled, apparelled and furnished with everything needful and "necessary for . . . the voyage." The shipowners had failed to obtain a necessary bill of health and were held to be in breach of their warranty in consequence.

Again, in *Ciampa* v. *British India Steam Navigation Co. Ltd.*[18] it was necessary for a ship carrying a cargo of lemons from Naples to London, which had previously called at Mombasa, where there was plague, to be fumigated when calling at the port of Marseilles. The cargo was in consequence damaged, and the shipowners were held liable on the ground that the ship was unseaworthy. The facts which brought about the necessity of fumigating arose and were known to the shipowners before the voyage started, and the purpose of the voyage was thereby foredoomed to failure. The present case is a very different one. It could not be said that the voyage was foredoomed to failure, nor was it expected that when the ship commenced to load there would be any factor which rendered her unfit for the voyage. She had called at the Israeli port of Haifa in the previous year, but the owners had no reason to anticipate any difficulty or delay in obtaining the necessary permission to load from the Syrian authorities. In any event, the question of whether the ship was

[16] [1927] 1 K.B. 743, 754.
[17] 4 Camp. 389.
[18] [1915] 2 K.B. 774.

seaworthy does not arise. If the implied warranty does not begin to operate until the ship sets sail on her voyage, it never attached to this ship at all.

It was further submitted by the charterers, and accepted by the owners, that in a charterparty such as the one in this case there is an implied warranty that the vessel will proceed with all reasonable speed to the place of loading and load with all reasonable dispatch. It would seem difficult to contend that there was a breach of this warranty in view of the finding of the arbitrator in paragraph 15 (1) of the case stated, where he found that "The vessel began the approach voyage to Lattakia in due "time and proceeded there with due dispatch," and (3), "The "respondents [the owners] and the master acted with reasonable "diligence with regard to the making of the declaration of future "non-co-operation with Israel." But it was contended that if there was some defect in the vessel not found normally in vessels of this class by reason of which the vessel was prevented from presenting herself for loading, there would be a breach of the implied warranty. It was put alternatively that there must at least be implied a term that a fact of this kind known to the owners and not known to the charterers will not cause any delay in the loading. I find it difficult to see how the first part of this contention can succeed. It appears to be an extension of the implied warranty for which there is no authority. The real question, in my judgment, is whether there should be implied a term that the necessity for obtaining the consent to load would not cause any delay in the loading.

Are the circumstances in which the contract was entered into between the parties sufficient to justify the inclusion of a term not normally implied? In *Comptoir Commercial Anversois* v. *Power, Son & Co.*[19] Scrutton L.J. said: ". . . it must be such a "necessary term that both parties must have intended that it "should be a term of the contract, and have only not expressed "it because its necessity was so obvious that it was taken for "granted." As in this case the charterers were not aware of the call at Haifa, it is difficult to see how they could have intended such a term to be implied. In any event it is impossible to say what their attitude might have been had they known all the facts. They might, of course, have insisted on an express term being included in the contract, but they might equally well have taken the view that the risk of delay was negligible, and that the ship would be allowed to proceed on the master signing the declaration of non-co-operation as on the four previous occasions. It could not be said in these circumstances that the necessity for the term proposed by the charterers was so obvious that it was taken for granted. It follows that I would come to the conclusion, as did the judge, that the appeal should be allowed. I come to the conclusion, however, for a different reason. Had I been of the opinion that the warranty which I have already cited from his judgment should be implied, I should have agreed with him that there had been no breach of it by the owners. In my judgment, however, the circumstances do not warrant such an implication. The warranty implied in the words " expected ready to load " is sufficient. Had the owners had difficulty in the past, by reason of the ship's call at Haifa in 1955, in obtaining permission to proceed on the respective voyages, or had they had reason to expect that there would be serious delay for this same reason when the ship arrived at Lattakia, there might well have been a breach of this warranty. Such, however, was not the case.

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[19] [1920] 1 K.B. 868, 899.

I would dismiss the appeal.

GORMAN J. In my view, there is no express warranty of seaworthiness or fitness for the contemplated voyage. The implied warranty of seaworthiness does not arise until the vessel sails with her cargo and not on the approach voyage. In this case this time was never reached and the implied warranty of seaworthiness never attached to the vessel.

The umpire found, in paragraph 15 (7) of his reasons, that at the time of the negotiation and execution of the charterparty the owners knew that the vessel had called at an Israeli port during February, 1955, and knew, or ought to have known, of the existence and effect of Legislative Decree No. 68 and of the instruction relating thereto. He also found that the owners also knew that, on previous occasions, the master had made declarations of future non-co-operation with Israel, and that the charterers did not, at the time of the negotiation and execution of the charterparty, know that the vessel had called at an Israeli port, or that the master had been required to make the aforesaid declarations. It was contended by the charterers that in such circumstances the ship was subject to a defect which made her unfit for the contemplated voyage. In my view, there was not, in this case, as contended, such a breach of warranty, within the authorities. In any case, any such warranty would not attach to the vessel on the approach voyage to the place of loading, and the warranty, if existing, did not attach to the vessel at any time. The judge had rejected the contention of the charterers.

There was an implied warranty that the ship would proceed with all due diligence to the place of loading. In the award, the umpire made the following findings of fact: 15 (1): "The vessel "began the approach voyage to Lattakia in due time and pro- "ceeded thence with due dispatch. . . . (3): The respondents "[owners] and the master acted with reasonable diligence with "regard to the making of the declaration of future non-co-opera- "tion with Israel."

This warranty is a warranty to proceed with reasonable dispatch; it is not an absolute obligation. There may always arise impeding factors or circumstances, but the existence of these is not necessarily a breach of the warranty. In my view, on the findings of the umpire, there has not been proved to have taken place a breach of the warranty to proceed with reasonable dispatch. The judge had rejected the contention of the charterers that the owners were in breach of the implied warranty of due diligence.

It was, however, contended by Mr. Megaw, on behalf of the charterers, that, in the circumstances of this case, the owners were guilty of breach of a warranty to be implied that the vessel would not be delayed by a special defect in the vessel known to the owners and not to the charterers. The judge said in his judgment [20]: " . . . I am prepared to hold, although I do not think "that any of the cases cited really assists me in this, that there was "an implied warranty by the shipowners not merely that they "would use due diligence to obtain, but that they would in fact "obtain whatever permissions to carry cargoes were necessary "under the Syrian Law of 1954 which was in force at the time "that the charterparty was entered into and applicable to vessels "of the category into which the *Nizetti* as they, the ship- "owners, knew, but as the charterers neither knew nor ought to "have known, fell." The judge also held that if such a warranty was to be implied, there was a time factor to be considered and that, when the final embargo took effect on June 3, 1956, a reasonable time for the obtaining of such permissions had not expired and there was therefore no breach by the owners of any such implied warranty. Mr. Ashton Roskill, for the owners, contended that, in the circumstances of this case, there was no room for such an implied warranty. He referred to Scrutton L.J.

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[20] [1959] 1 Q.B. 540.

in *Comptoir Commercial Anversois* v. *Power, Son & Co.*[21]: " . . . "it must be such a necessary term that both parties must have "intended that it should be a term of the contract, and have "only not expressed it because its necessity was so obvious that "it was taken for granted." In my view, Mr. Roskill was right, and there is no room, in law, for the introduction of the further warranty as suggested by Mr. Megaw and as found by the judge.

In my view there was no breach of contract under the charter-party by the owners, and I agree that this appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Ince & Co.; Edward Thompson & Hauser.*

I. G. R. M.

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[21] [1920] 1 K.B. 868, 899.

1960
May 5.

Lord Parker C.J., Gorman and Ashworth JJ.

REGINA *v.* JUDGE SIR DONALD HURST.
Ex parte SMITH.
REGINA *v.* OXFORD ELECTORAL REGISTRATION OFFICER.
Ex parte SMITH.

Crown Practice—Certiorari—Inferior tribunal—County court—Order of county judge made without jurisdiction—Whether certiorari will lie to quash—County Courts Act, 1959 (7 *&* 8 *Eliz.* 2, *c.* 22), *ss.* 107, 115.

Parliament—Election—Registration—Appeal to county court—Selected appeal—Objection to registration of 96 *names—Appeal in respect of six names—No notice of appeal served on remaining* 90*—Whether jurisdiction to direct removal of the* 90 *names from register—Representation of the People Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 68), *s.* 45 (1)*—County Court Rules,* 1936 (*as amended*), *Ord.* 43, *rr.* 3 (2), 8.

Section 107 of the County Courts Act, 1959, provides: " . . . no "judgment or order of any judge of county courts, nor any proceedings brought before him or pending in his court, shall be removed "by appeal, motion, certiorari or otherwise into any other court "whatever, except in the manner and according to the provisions in "this Act mentioned."

By section 115 (1): "The High Court or a judge thereof may "order the removal into the High Court, by order of certiorari or "otherwise, of any procedings commenced in the county court, if "the High Court or judge thereof thinks it desirable that the "proceedings should be heard and determined in the High Court."

Notwithstanding the provisions of section 107 of the County Courts Act, 1959, and that the only remedy by way of certiorari provided by the Act is in relation to the removal of proceedings to be heard and determined in the High Court, certiorari will lie to bring up and quash an order of a county court where the judge has acted without jurisdiction.

Ex parte Bradlaugh (1878) 3 Q.B.D. 509 applied.

A registration officer, determining, pursuant to section 9 (1) of the Representation of the People Act, 1949,[1] an objection to the registration in the register of electors for the City of Oxford of the names of 96 members of Ruskin College, Oxford, decided that all 96 should be included in the register. The objector appealed to the county court with regard to six of the names. No notices of appeal, or notice of selected appeal, under Order 43, rule 8 (1), of the County Court Rules, 1936 (as amended),[2] were served on any of the members, other than those six, and the remaining 90 members were not made parties to the appeal and did not appear and were not represented. On February 9, 1960, the county court judge allowed four and dismissed two of the appeals, and on the same day ordered that the names of the four persons in respect of whom the appeals had been allowed be deleted from the register. On February 12, 1960, the objector's solicitors and the registration officer appeared before the judge who, on the basis that the appeals had come before him as a test case, gave directions indicating that he had intended that "the effect of my decision is, that none of the names of persons "objected to . . . should appear on the register" with the exception of the two in respect of whom the appeals had been dismissed. The registration officer duly removed from the register not only the names of the four in respect of whom the appeals had been allowed, but also the other 90 names. On February 15, 1960, the register was published.

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[1] Representation of the People Act, 1949, s. 9 (1): "With a view to "the preparation of the registers, the "registration officer shall . . . (*c*) . . . "determine all claims for registration "duly made by any person, and all "objections to any person's registra-"tion. . . . "

S. 45 (1): "An appeal shall lie to "the county court—(*a*) from any "decision under this Act of the regis-"tration officer on any claim for "registration or objection to a per-"son's registration made to and con-"sidered by him."

Representation of the People Regulations, 1950 (S.I. 1950, No. 1254), reg. 62: "(1) A person desiring to "appeal against the decision of a "registration officer must give notice "of appeal to the registration officer "and to the opposite party . . . (3) "Where it appears to the registration "officer that any notices of appeal "given to him are based on similar "grounds, he shall inform the county "court . . . for the purpose of enab-"ling the court (if it thinks fit) to "consolidate the appeals or select a "case as a test case."

[2] County Court Rules, 1936 (as amended), Ord. 43, r. 3 (2): "The "respondents to the appeal shall be "the registration officer and the party "(if any) in whose favour the decision "of the registration officer was "given. . . ."

R. 8: "(1) Where two or more "appeals involve the same point or "points of law, the judge may direct "that one appeal shall be heard in "the first instance as a test case, and "thereupon the registrar shall send "to the parties to the selected appeal "and to the parties to the other "appeals and to the registration "officer a notice . . . (2) If within "five days of the service of such "notice on him any party to an appeal "other than the selected appeal gives "notice . . . that he desires the appeal "to which he is a party to be heard, "the registrar shall give notice . . . to "the other parties . . . (3) If the "registrar receives no such notice . . . "the parties to the appeal shall be "bound by the decision on the selected "appeal without prejudice to their "right to appeal to the Court of "Appeal . . ."

On an application by one of the 90 members of the college, who had not been a party to an appeal, for an order of certiorari to quash the directions of the judge given on February 12, and also for an order of mandamus requiring the registration officer to restore to the register his name and the names of the other members of the college affected by the directions:—

Held, (1) that under Order 43, rules 3 (2) and 8, of the County Court Rules, 1936, the first step in any case was that all the persons whose names were in dispute should be made parties to appeals, and that then it could be ruled that one should be treated as a selected appeal, and that, as no such step had been taken, and the remaining 90 persons whose names were in question had not been made parties to appeals, the directions given by the judge on February 12, 1960, were given without jurisdiction, so that the applicant was entitled to an order of certiorari to quash the directions.

(2) That since, but for the directions, the registration officer would not have removed his name from the register, the applicant was also entitled to an order of mandamus directing the registration officer to put his name on the register.

APPLICATIONS for orders of certiorari and mandamus.

The following statement of facts is taken from the affidavits filed in support of the applications: On December 31, 1959, the Electoral Registration Officer for the City of Oxford heard and determined claims and objections in respect of the Register of Electors for the City of Oxford under the Representation of the People Act, 1949, by one P. G. Gower, objecting, inter alia, to the inclusion in the register of the names of 96 members of Ruskin College, Oxford, of whom the applicant, Samuel Adolphus Smith, was one. It was agreed between the registration officer and the objector that objection would be made in respect of 10 names only, and that if his objection to those 10 names were to fail, he would not proceed against the remaining 86 names. The applicant's name was not among those 10 names, and he was not present at the hearing, but was represented by the secretary of the college. He was not a party to, and did not know of, the agreement. On the same day the registration officer gave his decision, which was that the 10 names should be included in the register, together with the remaining 86 names, against whom the objector no longer proceeded.

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The objector appealed to the Oxford County Court with regard to six names. The name of the applicant was not included among those six names. No notices of appeal of any sort, and no notices of selected appeal under Order 43, rule 8 (1), of the County Court Rules, 1936, were served on any members of Ruskin College save for the six, and the applicant, therefore, was not a respondent to the appeal and he was not present and not represented. The appeals were heard on February 9, 1960, and the judge, reserving his reasons, decided that four of the appeals should be allowed and two dismissed: on the same day he ordered that the names of the four persons in respect of whom appeals had been allowed be deleted from the register.

On February 12, 1960, the registration officer and the solicitors for the objector came before the judge when he gave oral directions in explanation of his order of February 9 which, put into writing and signed by the judge on March 4, 1960, were as follows: "I give directions to remove any misunderstanding of "the effect of my judgment given 9th February, 1960, as follows: "From the statement of the registration officer it is clear to me "that the case was dealt with by him as a test case, covering "objections raised by Mr. Gower to 96 names of persons at "Ruskin College and The Rookery. That the appeals before me "were similarly a test case—my decision being sought on the point "of principle covering all 96 names. That I so dealt with it, and "indicate that I intend that the effect of my decision is, that none "of the names of persons objected to by Mr. Gower before the "registration officer should appear on the register to be published "on 15th February, 1960, with the exception of" the two persons in respect of whom the appeals had been dismissed.

The registration officer caused the name of the applicant and of the other 89 members of Ruskin College to be removed from the register, and the register was published on February 15, 1960, those names having been deleted. On February 25, 1960, the judge gave the reasons for his decision of February 9, 1960. On April 25, 1960, the applicant's solicitor wrote to the registration officer informing him of the proposed proceedings, and the registration officer replied, inter alia, that he could not ignore the specific direction given to him by the judge on February 12 to take the names off the register.

The applicant now applied for an order of certiorari to bring up and quash the directions in writing dated March 4, 1960, and given orally on February 12, 1960, and an order of mandamus requiring the registration officer to add to the electoral register published on February 15, 1960, the names of the applicant and the other members of Ruskin College affected by those directions. The grounds of the applications were: (1) that the appeal to the county court named as respondents only six persons and did not include the applicant or the other members of Ruskin College mentioned in the directions, who, accordingly, were not parties to the appeal; (2) that no notice of selected appeal had been served on the applicant or any of those members by the registrar of the county court in accordance with Order 43, r. 8 (1), of the County Court Rules, 1936 (as amended) or at all; (3) that in those circumstances the judge had no jurisdiction to order the exclusion of the names of the applicant and those members from the register, and that after the order of February 9, 1960, the judge was functus officio in the matter; (4) that in view of the finding of law by the judge that the test of residence was whether or not the respondents to the appeal had a home in the United Kingdom outside the City of Oxford, there was no evidence before the court that the applicant and the other members had such homes; (5) that the applicant and the other members were debarred from appealing to the Court of Appeal by the provisions of the County Courts Act, 1959, whereby no appeal lay to the Court of Appeal save by a party to the proceedings in the county court; (6) that the judge in ordering the name of the applicant and the other members to be excluded from the register was acting in a manner contrary to natural justice; and (in the case of the application for an order of mandamus) (7) that in removing and excluding the names of the applicant and the other 89 members from the register, and refusing to reinstate them, the registration officer was acting without lawful authority, in excess of his jurisdiction and in breach of the duties imposed on him under the Representation of the People Act, 1949.

Stephen Tumim for the applicant. The directions given by the county court judge on February 12 that the names of the applicant and the other 89 members of the college should be removed from the register were given without jurisdiction. The objector was entitled under section 45 (1) of the Representation of the People Act, 1949, to appeal from the decision of the registration officer in their cases, but notices of appeal should have been served on all 90, and they should have been made respondents to appeals: see regulation 62 of the Representation of the People Regulations, 1950, and Order 43, rule 3 (2), of the County

Court Rules, 1936. That was not done. Notices were not served; they were not respondents to appeals, and they were in no way parties to the proceedings before the county court judge. In any event the procedure and the service of notices contemplated by the County Court Rules, 1936, Ord. 43, r. 8, in relation to test cases, was not complied with, so that the decision would not be binding on them. Further, there was no evidence before the judge concerning the cases of the applicant and the other 89, and their residence, and any order made regarding them was made without investigation of the facts relating to each individual.

Certiorari will lie against a county court judge despite the provisions of sections 107 and 115 (1) of the County Courts Act, 1959—where he acts without jurisdiction such statutory provisions will not preclude the court from issuing certiorari: *Ex parte Bradlaugh*[3] and *Reg.* v. *Worthington-Evans, Ex parte Madan.*[4]

[Lord Parker C.J. referred to *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore.*[5]]

That is another example of the principle that in these circumstances the remedy of certiorari is not ousted by the statute.

Under section 45 (4) of the Representation of the People Act, 1949, the registration officer was under a duty to give effect to the decision of the judge. But the only lawful decision was that of February 9 relating to the six persons in respect of whom appeals had been determined, so that, in obeying the judge's directions of February 12 in regard to the applicant and the other 89 persons, the registration officer exceeded his duty. Unless the court orders mandamus, there is no procedure and no statutory provision whereby the registration officer can be required to replace those names on the register, and, therefore, it is submitted that the court should issue mandamus directing him to do so.

David Trustram Eve, for the registration officer, did not oppose the applications. The registration officer is concerned only that he should receive a clear indication as to which persons are or are not entitled to have their names on the register. Should the court grant the applicant an order of certiorari, it is conceded that he would also be entitled to mandamus.

J. R. Cumming-Bruce as amicus curiae. The registration officer dealt with certain of the objections as a test case, and the judge was under the false impression that the appeals before him were also test cases. On the face of the proceedings, it appears that the registration officer applied to all the cases a test which the judge held to be wrong. If, therefore, this court issues mandamus, it will be directing the registration officer to place on the register names which should not be there. One view is that the registration officer should be put in a position to apply the right test in the cases of the applicant and the other 89 persons, and act accordingly. But another view is that it was for the objector, if dissatisfied with the decision of the registration officer in more than the six cases, to have followed the special procedure laid down in the Representation of the People Rules, 1950, and Order 43, rules 3 and 8, of the County Court Rules, 1936, and that, as he did not do so, he cannot complain if the decision of the registration officer in respect of the other names stands, whether or not it was wrong in law.

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[3] (1878) 3 Q.B.D. 509.

[4] [1959] 2 Q.B. 145; [1959] 2 W.L.R. 908; [1959] 2 All E.R. 457.

[5] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796, C.A.

Tumim replied.

LORD PARKER C.J. In these proceedings Mr. Tumim moves on behalf of Samuel Adolphus Smith for an order of certiorari to quash a decision of Judge Sir Donald Hurst in the Oxford County Court so far as it consists of certain directions given by him on February 12 of this year. He also applies for an order of mandamus to the Electoral Registration Officer for the City of Oxford directing him to add the name of the applicant, Samuel Adolphus Smith, to the register of electors.

It is a curious case, and it arises in this way: There are a number of students of Ruskin College, some 96 in all, who claim that they qualify to have their names put on the register. A claim was made by one P. G. Gower against the registration of those 96 names and, I think, of others. That claim was made under section 9 (1) (*c*) of the Representation of the People Act, 1949, which provides: "With a view to the preparation of the "registers, the registration officer shall . . . (*c*) except in Northern "Ireland, determine all claims for registration duly made by "any person, and all objections to any person's registration duly "made by another person appearing from the electors lists to "be himself entitled to be registered."

Having heard and considered the matter, the registration officer decided that the names of all those 96 persons, which included the applicant's, should be and remain on the register. The objector appealed, as he was entitled to do under section 45 (1) (*a*) of the Act of 1949, to the Oxford County Court. His appeal, however, only related to six names out of the 96, and those six names did not include the name of the applicant.

On February 9, 1960, the appeal was heard. The registration officer and the objector were both represented. There were, as I have said, six parties to the appeal, but the applicant and the other 89 were not made parties to the appeal at all. The question at issue in the appeal was as to the meaning of " residence " for the purposes of qualifying to be on the register, and the county court judge decided that four out of those six were resident outside the City of Oxford and not entitled to be on the register, but that two of them, who were resident in Oxford, were entitled to be on the register. On that day an order was drawn up allowing the appeal of the objector in respect of the four and dismissing the appeal in so far as it related to the two. The register was due to be published shortly, on February 15, and it is clear that both the judge and the registration officer were anxious that the matter should be put in order and the register published. On February 12 the solicitors representing the objector and the registration officer appeared before the judge, no doubt to elucidate what was to be done as the result of the order drawn up on February 9. The registration officer was clearly very concerned about it because, under section 45 (4) of the Act, it was his duty to give effect to the decision. That subsection reads: " Notice shall be sent to the " registration officer in manner provided by rules of court of " the decision of the county court or of the Court of Appeal on " any appeal by virtue of this section, and the registration officer " shall make such alterations in the electors lists or register as " may be required to give effect to the decision."

On that day, February 12, the judge gave directions, although they were not signed until March 4, in these terms: " I give " directions to remove any misunderstanding of the effect of my " judgment given February 9, 1960, as follows: From the state- " ment of the registration officer it is clear to me that the case " was dealt with by him as a test case, covering objections raised " by Mr. Gower to 96 names of persons at Ruskin College and " The Rookery. That the appeals before me were similarly a test " case—my decision being sought on the point of principle cover- " ing all 96 names. That I so dealt with it, and indicate that I " intend that the effect of my decision is, that none of the names " of persons objected to by Mr. Gower before the registration " officer should appear on the register to be published on " February 15, 1960, with the exception of Brian George Ball "and Francis Richard Adams." Those were the two people in respect of whom the appeal had failed and whom the judge thought were rightly on the register. In the directions he was saying, in effect, to the registration officer: "My intention was that "you should not merely remove from the register the names of "the four in respect of whom the appeal has succeeded but all the "other 90," the other 90 names including the name of the applicant in these proceedings. As the result, the registration officer obeyed those directions and removed all the 90 names from the register which was published on February 15.

Mr. Tumim, for the applicant, points out that the 90 persons whose names were removed from the register were in no way parties to the appeal, and his submission is that in those circumstances the directions of the county court judge in regard to them were made without jurisdiction. He says, secondly, that if they can be said to have been parties to the appeal in any form, then at any rate the procedure envisaged by the County Court Rules, 1936, was not complied with. Thirdly, he points out that the effect of what was done is that the names of all the 90 persons, including that of the applicant, have been removed from the register without the facts of each case ever being considered, in other words, without seeing whether the tests of qualification laid down by the judge apply or do not apply in their cases.

That the applicant was not a party to the appeal is clear. The judge apparently thought, and with some reason, that the whole procedure from the beginning had been in the nature of a test case, and in giving those directions he assumed that, although the applicant was not a party to the appeal, arrangements had been made whereby he was in some way bound by the result, and the same with regard to the other 89. But it is quite clear that that was not so, and not only that, but that the procedure envisaged by the rules was not complied with. Order 43 of the County Court Rules, 1936, provides, by rule 3 (2) that "The respondents to "the appeal shall be the registration officer and the party (if "any) in whose favour the decision of the registration officer was "given," and, accordingly, each one should be made the subject of an appeal. It is then provided by rule 8 (1): "Where two "or more appeals involve the same point or points of law, the "judge may direct that one appeal shall be heard in the first "instance as a test case." And by rule 8 (3): "If the registrar "receives no such notice within the time so limited, the parties "to the appeal shall be bound by the decision on the selected "appeal without prejudice to their right to appeal to the Court "of Appeal, and an order similar to the order made in the selected "appeal shall be made without further hearing." That is the machinery provided for test cases or representative actions, whatever they may be called. The first step in each case is that the parties whose names are in dispute are all to be made parties to appeals. Then it can be ruled, when there are a number of appeals, that one should be treated as a selected appeal, but no such machinery was employed in this case. It seems to me also to be clear that, in the result, the applicant and, indeed, the other 89, have had their names removed from the register without their individual cases in regard to residence being considered at all.

That being so, it seems to me that the judge's directions of February 12 were given without any jurisdiction, and prima facie the applicant is entitled to an order of certiorari to quash those directions. It has, however, been pointed out that section 107 of the County Courts Act, 1959, provides: "Subject to the provisions of any other Act relating to county courts, no judgment "or order of any judge of county courts, nor any proceedings "brought before him or pending in his court, shall be removed by "appeal, motion, certiorari or otherwise into any other court "whatever, except in the manner and according to the provisions "in this Act mentioned." Section 115 provides: "(1) The High "Court or a judge thereof may order the removal into the High "Court, by order of certiorari or otherwise, of any proceedings "commenced in a county court, if the High Court or judge "thereof thinks it desirable that the proceedings should be heard "and determined in the High Court." Looking at those two sections, it is to be observed that the only remedy by way of certiorari dealt with is in regard to the removal of the proceedings from one court into another, and not for the purposes of quashing. Notwithstanding that, I am quite satisfied that certiorari will lie in this case. The leading case on the matter is *Ex parte Bradlaugh*,[1] where Mellor J. put the principle in these few words[2]: "It is well established that the provision taking away the "certiorari does not apply where there was an absence of jurisdic"tion," and went on[2]: "The consequence of holding otherwise "would be that a metropolitan magistrate could make any order "he pleased without question." To the same effect are a number of cases including, coming to quite recent times, *Reg.* v.

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[1] (1878) 3 Q.B.D. 509.

[2] Ibid. 513.

Worthington-Evans, Ex parte Madan,[3] and *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*.[4] I am quite satisfied that certiorari will lie against a county court judge if he has acted without jurisdiction, notwithstanding the provisions of the County Courts Act, 1959, to which I have referred. Accordingly, it seems to me that in this case it would be right for the court to grant the order to quash the directions given by the judge on February 12.

So far as the registration officer is concerned, unfettered, if I may use that term, by those directions, he would in the ordinary way not have removed the applicant's name from the register, and I think that the applicant, accordingly, is entitled to the almost consequential relief of an order of mandamus to the registration officer to put his name on the register.

For these reasons I would order certiorari and mandamus to issue.

GORMAN J. I agree, and I desire to add nothing.

ASHWORTH J. I also agree.

Tumim, for the applicant, pointed out that the relief claimed in the application for the order of mandamus also referred to the names of the members of the college stated in the directions, which included the further 89 persons who were in the same position.

LORD PARKER C.J. Do not let us fall into the trap. This is a single application on behalf of Samuel Adolphus Smith, and all that we can do, therefore, in these proceedings, is to quash the directions generally, I did not say so far as they relate only to the applicant, as having been given without jurisdiction. When we come to mandamus, the specific order we make is that the applicant's name shall be inserted in the register. No doubt the registration officer without any order of mandamus will, as I have said, unfettered by the directions of February 12, insert all the names in the register, but it is not for us to order that.

Orders accordingly.

Solicitors: *Field, Roscoe & Co. for Reeves & Co., Oxford; Sharpe, Pritchard & Co. for Town Clerk, Oxford; Treasury Solicitor.*

J. F. L.

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[3] [1959] 2 Q.B. 145; [1959] 2 W.L.R. 908; [1959] 2 All E.R. 457, D.C.

[4] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796, C.A.

C. A.

1960
Mar. 21,
22, 23;
April 12.

Sellers,
Ormerod and
Upjohn L.JJ.

ACKROYD & SONS *v.* HASAN.

[1957 A. No. 1297.]

Agency—Estate agent—Commission—Whether "prepared to" means "does"—Payable upon introduction of a person "prepared to enter "into a contract to purchase on certain terms or on such other terms "to which you may assent"—Agreement to sell property "subject "to contract"—Contract to purchase signed by purchaser—Refusal by vendor to sign contract—Meaning of "prepared to enter into a "contract"—Meaning of "assent"—Whether assent given by vendor—Whether agent's commission payable.

The plaintiffs, a firm of estate agents, were consulted by the defendant, who wished to sell her leasehold interest in certain premises. The terms of the contract between the parties were contained in a letter written by the plaintiffs, which set out the terms upon which the defendant was prepared to sell the lease, and continued: "We would take this opportunity of confirming that in "the event of our introduction of a party prepared to enter into a "contract to purchase on the above terms or on such other terms "to which you may assent you will allow us commission upon the "scale of the Estate Agents' Institute."

The plaintiffs introduced two applicants who were interested jointly in purchasing the lease, and negotiations proceeded between the applicants and the defendant "subject to contract." At the conclusion of these negotiations the solicitors acting respectively for the applicants and for the defendant prepared counterparts of the proposed contract of sale. The applicants signed their part of the contract, and it was forwarded to the defendant's solicitor, who sent the defendant's part of the contract to her for signature. The defendant then decided not to sign her part of the contract and, in consequence, no enforceable contract came into existence.

In an action by the plaintiffs claiming that they had earned their commission under the contract with the defendant:—

Held, that the defendant could not give her assent to the terms of the proposed sale until she had received and approved the counterpart of the proposed contract; accordingly, there had been no assent by her to the terms of the proposed sale, and, in consequence, the event stipulated in the contract as that upon which the plaintiffs' commission would be earned had never occurred, and the plaintiffs' claim failed (post, pp. 161, 166).

Per Ormerod and Upjohn L.JJ. That the ordinary rules of construction governed the interpretation of estate agents' contracts so that there was no justification for interpreting the words "introduction of a party prepared to enter into a contract" as "introduction of a party who does enter into a contract," nor did the word "assent" mean a final and legally binding assent (post, pp. 155, 157, 160, 163, 164).

Luxor (Eastbourne) Ltd. v. *Cooper* [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33, H.L., and *Midgley Estates Ltd.* v. *Hand*

[1952] 2 Q.B. 432; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394, C.A. applied.

Per Sellers L.J. "I am not at present satisfied that . . . the "assent of the defendant, which the agreement requires, could be "an assent which fell short of concluding a bargain with the "applicants" (post, p. 167).

Decision of Winn J. [1959] 1 W.L.R. 706; [1959] 2 All E.R. 370 affirmed on different grounds.

Appeal from Winn J.

The following statement of facts is taken substantially from the judgment of Upjohn L.J.

In July, 1956, Mr. Smalley, a partner in the plaintiff firm of estate agents, approached the defendant, Mrs. Hasan, and her husband, with a view to introducing a purchaser of leasehold premises known as 11, Wardour Street, W.1, belonging to the defendant. The premises consisted of a ground floor and basement on which the defendant carried on the business of a restaurant, her husband being the manager. On the second floor the defendant's husband carried on the business of a club with the help of the defendant.

The first floor was partly let off, and, as to the rest, was used as a store and office mainly for the restaurant but partly also for the club under informal arrangements made between the defendant and her husband.

The defendant and her husband gave some oral instructions to Mr. Smalley on July 23, 1956, and he confirmed them by letter next day in these terms:

"Dear Sir,

"re 11 Wardour Street, W.1.

"Following our meeting of yesterday, we are pleased to con- "firm with thanks, receipt of your instructions to offer for sale "your leasehold interest in the above property together with the "business of the Stage Door Grill on the ground floor and base- "ment, in the sum of £12,000 S.A.V., it being agreed that you "shall take a tenancy of the second floor at a rent of £500 per "annum.

"We are immediately placing particulars of this proposition "before all likely applicants and assure you of our best and "continued endeavours on your behalf.

"We would take this opportunity of confirming that in the "event of our introduction of a party prepared to enter into a "contract to purchase on the above terms or on such other terms "to which you may assent you will allow us commission upon the "scale of the Estate Agents' Institute.

"Yours faithfully,
"ACKROYD & SONS."

In giving instructions to the plaintiffs, the defendant never explained that it would be necessary to keep some storage space on the first floor for use by her husband in connection with the club that he was to continue carrying on on the second floor under the terms of the sub-lease, which was to be granted to him as part of the bargain.

Although the applicants interested in the purchase of the premises at 11, Wardour Street, began discussions from a date early in August, 1956, negotiations took a long time to fructify and it was not until nearly the end of October, 1956, that the basic purchase price for the lease of the premises was agreed at the sum of £9,750, of which £6,000 was to remain on mortgage repayable over the term of the remaining six years of the lease, and that the rent of the sub-lease to the defendant's husband was agreed at £500 per annum.

Solicitors were then instructed on behalf of the defendant and the applicants and each solicitor received a letter from the plaintiffs dated October 27, 1956, setting out the basic terms of the proposed contract as the terms were then understood by them. It was made quite clear in that letter that all negotiations were to be subject to contract.

In November the defendant took up the applicants' references, and the applicants on their part had a surveyor's report. Ultimately, the defendant's solicitor sent a draft contract to the solicitors instructed by the applicants on November 30, 1956. It was agreed between these solicitors in the interests of their clients that drafts of the mortgage and the sub-lease of the second floor should be annexed to the contract, and drafts of those documents were sent on by the defendant's solicitor shortly afterwards. During December the parties and their solicitors continued negotiating on minor details, e.g., obtaining draft consents by the head landlord to the assignment of the lease, to the transfer of liquor licences, and other details of that sort. On December 28, 1956, the defendant's solicitor wrote to the solicitors for the applicants a letter, which started by saying: "I have now had an "opportunity of considering the document in detail with my "client" (referring to the contract and the various documents annexed thereto), "and the following points arise." There was a paragraph in the letter which dealt with the underlease to the defendant's husband, and it stated that his client felt that the user of the premises comprised in the underlease should not be restricted to that of a non-residential club, but that he should also be entitled to use the premises for office purposes if required. This and many other matters of detail were satisfactorily settled, and on January 10, 1957, the applicants' solicitors sent the following letter: "We now enclose our client's part of the con- "tract signed together with draft underlease approved. As you "see, we have retyped your original draft as the many amend- "ments make it difficult to follow. Please let us have your "client's part of the contract in exchange as soon as possible." To that the solicitor for the defendant replied that there had not yet been returned the draft mortgage, which would require to be annexed to the contract, and he asked for it to be sent on, and there was also a point on the inventory. Both these matters were, however, cleared up satisfactorily. Further amendments were then made by the solicitor for the defendant on behalf of his clients to the underlease of the second floor. He stated in his letter of January 14, 1957, to the solicitors for the applicants: "I have forwarded the contract to my client for signature on the "basis that you agree these amendments and will you please "telephone me on receipt of my letter." On January 15 the applicants' solicitors replied, agreeing the further amendments to the draft underlease.

On January 17, 1957, so far as the solicitors were concerned all matters were agreed and, on that date, the defendant's solicitor wrote to the applicants' solicitors: "I refer to your letters "of the 15th and 16th. I confirm that I have sent all the docu- "ments to my client and am waiting her instructions. I shall "be telephoning her during the day to ascertain the position." He also acknowledged the receipt of the cheque which represented the balance of the deposit, part of it having been paid some weeks earlier. The defendant's solicitor then went to see the defendant at her restaurant and he explained the documents to her, when it emerged for the first time that the defendant apparently had it in mind that her husband must have the use of a store on the first floor for his non-residential club in continuance of the existing arrangements between herself and her husband.

The defendant then put forward other proposals to meet the difficulty created by her failure to give proper instructions to the plaintiffs, but those proposals were not acceptable to the applicants and the contract never came into existence.

It was common ground between the parties that if the agents had earned their commission, it would amount to £404 7s. 6d. The plaintiffs claimed this amount as commission due to them from the defendant under the terms of the contract. Winn J. dismissed their claim. The plaintiffs appealed.

Harold Lightman Q.C. and *Edward Seeley* for the plaintiffs. This case turns on the true construction of the letter of July 24, 1956. The judge held that there was a philosophy behind the decisions of this court in 1951 and 1952 which constrained him to read the words "party prepared to enter into a contract" as meaning a "party who has entered into a contract." That construction gives to the words of the contract an artificial meaning. The true view is that effect must be given to the natural meaning of the words used; estate agency contracts do not differ in this respect from any other class of contracts.

The defendant had overlooked that the wines of the club carried on by her husband on the second floor of the premises were being kept in the storeroom on the first floor. When this difficulty about the storeroom became apparent to the defendant on looking at the completed documents, she resiled from the terms that had been agreed, and the proposed sale fell through. The retention of a part of the first floor was a complete afterthought. The plaintiffs had done all that they had contracted to do by producing two applicants who had been prepared jointly to enter into a contract on terms to which the defendant had clearly assented. The applicants had shown their preparedness by signing the engrossment agreed between the solicitors. The applicants had made an unconditional tender of the draft contract which the defendant could convert into a binding contract by her acceptance.

Where an agent has produced someone prepared to purchase on terms specified by the vendor, and those terms have been finalised in legal documents, the agent has earned his commission because he has obtained an unconditional offer to purchase on agreed terms. If the vendor then resiles on a new ground, the agent can claim his commission although no binding contract ever comes into existence.

If there is any doubt or ambiguity in estate agents' contracts, they must be construed contra proferentes; otherwise they must be given their ordinary natural meaning. There is no special philosophy or rule of construction applicable to them. In substance this case is similar to *John E. Trinder & Partners* v.

Haggis,[1] where commission was payable upon the agent "finding "someone willing to sign a contract"; the majority of the court, Lord Evershed M.R. and Roxburgh J., held that commission was earned when the purchaser signed the contract, although the vendor did not do so. They rejected the view of Denning L.J., who dissented, that "willing to sign" meant "irrevocably will-"ing"—the proof of which could only be evidenced by a contract binding on both parties. So in the present case there can be a preparedness to enter into a contract before the contract is concluded.

The dissenting judgment of Denning L.J. in *Trinder's* case,[1] where he construed the words of the contract in a qualified sense so as to obtain what he termed a reasonable result, was the basis on which the judge formed his conclusions in this case. But Denning L.J.'s principle of construction has never been accepted by this court. The courts do not avoid apparent injustice by a forced construction of the language used by the parties. If it is desired to lay down as a rule of law that there should be no commission until a sale, that can only be done by the legislature.

The letter of July 24 contemplated the production of a formal document, because it referred to a lease. The basic terms of the contract of sale were agreed in October, 1956, and as soon as they had been put into formal shape by the solicitors in a formal document and approved of the agents were entitled to commission.

It cannot be right that a vendor can snap his fingers at his agents after prolonged negotiations if a last-minute purchaser comes along with the offer of a higher price. That is not consistent with the true intention of the parties. In such a case there may have been a refusal to assent as between purchaser and vendor, but not as between the agent and his principal. In the present case no terms which the plaintiffs were asked to negotiate were going to be varied one iota.

By October, 1956, there had been an assent by the defendant to the proposed sale. No difficulty was anticipated at that date, and all the solicitors were concerned to do was to work out and complete the formal documents. Alternatively, there clearly must have been an assent by December 28, 1956, because the letter from the defendant's solicitor to the solicitor for the applicants stated that the defendant's solicitor had considered the document in detail with the defendant; the defendant must therefore have seen and approved the document. It is true that the letter referred to certain details regarding the proposed underlease to the defendant's husband, but those had all been settled by January 10, 1957, when the solicitors for the applicants sent the applicants' part of the contract with the draft underlease as approved between the solicitors. So that, at the latest, there had been an assent by the defendant to the terms of the proposed sale on January 10, 1957.

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[1] [1951] W.N. 416, C.A.

The judge accepted that there had been an assent, but because he treated the words "prepared to enter" as a nullity, he held that the "assent" had to be an irrevocable assent embodied in the contract—a quite artificial construction of the term. The meaning of "assent" takes its clear colour from the words "prepared to enter into." If "assent" is construed as "irrevocable assent," the words "prepared to enter into" are otiose. Those words indicate that the parties contemplate an assent which is not embodied in a contract.

The parties here were ad idem on the terms recorded by the solicitors with their full authority in the documents. The applicants signed their part of the draft contract and unconditionally sent it to the defendant's solicitor for exchange. In such a case there are purchasers prepared to enter into a contract on terms mutually agreed.

The following principles are applicable to this case. First, in the absence of special circumstances, such as unfair dealing, the only test of an estate agent's claim for commission is the true construction of the contract: *Midgley Estates Ltd.* v. *Hand.*[2] Second, there is no special rule of construction applicable to estate agents' contracts: *Luxor (Eastbourne) Ltd.* v. *Cooper.*[3] Third, contracts for securing a commission upon an introduction which does not result in a sale must be in clear and unequivocal language: *Luxor (Eastbourne) Ltd.* v. *Cooper.*[4] Fourth, where an agent is entitled to a commission on an introduction which does not result in a sale, he can only succeed if it is his principal who resiles from the proposed sale. Fifth, while it might be possible on a close analysis of language to create doubts, it is the duty of the court to give a reasonable meaning to words used and to avoid fine distinctions: *John E. Trinder & Partners* v. *Haggis.*[5] Sixth, if the event on which commission is payable is the signing of a binding contract, the contract must be one which cannot be avoided because of misrepresentation: *Peter Long & Partners* v. *Burns.*[6] Seventh, if the commission is payable on the securing of an offer to purchase, the offer must be unconditional. Eighth, if commission is payable on the introduction of a purchaser, that event connotes a concluded bargain and no commission is payable until a contract is created.

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[2] [1952] 2 Q.B. 432; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394, C.A.

[3] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33, H.L.

[4] [1941] A.C. 108.

[5] [1951] W.N. 416.

The judge was much impressed by *Peter Long & Partners* v. *Burns*,[7] but that case is quite distinguishable because there the contract was voidable. The judge appears to have derived a philosophy from *Dennis Reed Ltd.* v. *Goody*[8] and *Graham & Scott (Southgate) Ltd.* v. *Oxlade*,[9] but those cases do not assist; they were concerned with finding purchasers, not with persons prepared to enter into contracts. The judge thought the two were synonymous.

The courts should not draw fine distinctions between one formula and another: see *per* Lord Evershed M.R. in *Bennett, Walden & Co.* v. *Wood.*[10] The effect of the words "prepared to "enter into a contract" should be the same as "willing to sign "a contract," in which case the agent is entitled to commission when the proposed purchaser signs his counterpart of the draft contract. The case had proceeded below on the footing that all the terms had been assented to; the defendant has not served any notice under R.S.C., Ord. 58, r. 6, on this point.

D. P. Croom-Johnson Q.C. and *Peter Ripman* for the defendant. "Prepared" is a continuing condition, and in the present case the applicants must be prepared up to the time of the final concluded assent. A provisional assent will not suffice. Where negotiations are proceeding subject to contract, it is difficult to envisage how there can be an assent before the contract. The fact that negotiations are subject to contract is inconsistent with a state of willingness or preparedness on the part of either party: see *Graham & Scott (Southgate) Ltd.* v. *Oxlade.*[11] Where the parties have reserved their locus poenitentiae, it is not possible to say that the breakdown in negotiations was due to the fault of one party or the other. There was a genuine misunderstanding in the present case and it is quite wrong to say that the defendant

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[6] [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25; on appeal [1956] 1 W.L.R. 1083; [1956] 2 All E.R. 207, C.A.

[7] [1956] 1 W.L.R. 413.

[8] [1950] 2 K.B. 277; 66 T.L.R. (Pt. 1) 918; [1950] 1 All E.R. 919, C.A.

[9] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 747; [1950] 1 All E.R. 864, C.A.

[10] (1950) 66 T.L.R. (Pt. 2) 3, 6; [1950] 2 All E.R. 134, 136, C.A.

[11] [1950] 2 K.B. 257.

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resiled from the bargain. It could equally be said that the final proposals of the defendant when she learnt of the mistake were resiled from by the applicants. Where there is a constant process of adding to and altering terms until the moment of exchange, the final mutual agreement can only be evidenced by the exchange of contracts. To assent means, in ordinary language, to agree, and until the exchange of contracts there is no assent. It would be wholly unreasonable that at some earlier stage in the negotiations, e.g., when the price is agreed, that the right to commission arises.

From the plaintiffs' argument it becomes difficult to say when the commission crystallises. At different stages of the case four different dates have been given. Until the exchange of contracts no one is bound and either party has the right to withdraw: see *Eccles* v. *Bryant and Pollock*.[12] In *Graham & Scott (Southgate) Ltd.* v. *Oxlade* [13] Cohen L.J.[14] equated the words "willing to "purchase" with "prepared to purchase." It was there held that a purchaser was not willing to purchase when he made an offer subject to contract, because the two things were inconsistent. The contrary view was taken in *Giddy and Giddy* v. *Horsfall*,[15] where the actual words were "prepared to purchase," but that case was overruled in *Graham & Scott (Southgate) Ltd.* v. *Oxlade*.[16] The normal inference where negotiations are subject to contract is that the purchaser or vendor can withdraw at any time before exchange. That is the inference to be applied where the words willing or prepared to purchase are used in the contract. That is exactly the position in the present case.

If the plaintiffs are right, one would never know when commission crystallises. It could happen by accident if the negotiations happened to reach a stage where for the moment no one could think of any further point to raise. All that happened in the present case was that at the penultimate stage of the negotiations, which were subject to contract, the applicants made an offer. The negotiations failed to materialise in a binding contract not because of any act by one party or the other, but because, albeit at a late stage of the negotiations, they could not agree. The inherent quality of the negotiations is their fluidity; there is always the liability of change. It is impossible to say that a person is finally prepared to do something until he has done it

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[12] [1948] Ch. 93; [1947] 2 All E.R. 865, C.A.

[13] [1950] 2 K.B. 257.

[14] Ibid. 262.

[15] (1947) 63 T.L.R. 160; sub nom. *Giddys* v. *Horsfall* [1947] 1 All E.R. 460.

[16] [1950] 2 K.B. 257, 265.

—for short of doing it there is no conclusive evidence of his preparedness. Preparedness can be equated with willingness or ability. Just as in *Graham & Scott (Southgate) Ltd.* v. *Oxlade* [17] there could not be willingness to purchase when there were negotiations subject to contract, so here, once there was the element of negotiations subject to contract, there could be no preparedness until the negotiations were concluded. The two things are inconsistent.

Emphasis is laid on the use of the word "allow" in the contract. An "allowance" contemplates the existence of a fund, but a fund can only come into being upon the creation of a contract, when the deposit becomes payable. The use of the word "allow" points to the reasonable interpretation of the contract, namely, that there must be a final and irrevocable preparedness to contract in terms to which the vendor must irrevocably assent.

John E. Trinder & Partners v. *Haggis* [18] is distinguishable, because there the event entitling the estate agent to commission was the signature of the proposed purchaser to his part of the contract, and that event had occurred, for he had signed his counterpart. That case and the present case are quite different, because the events entitling the agent to commission are not comparable. The right to challenge the decision in *John E. Trinder & Partners* v. *Haggis* [19] in a higher court is, however, formally reserved.

There never was an assent by the defendant to the terms of the proposed sale. The assent required must be the assent of the defendant personally; his solicitor had no authority to give an assent on his behalf. The mere fact that at some stage the solicitor has shown a draft contract to his client does not require the inference that the client has assented in any sense of the term to everything contained in the documents. In the present case the use of the storeroom on the first floor was never considered prior to the defendant seeing the completed documents on January 17, 1957. One cannot assent to something which has not been considered at all. On any view, it cannot be said that there ever was an assent by the defendant to the term of the underlease relating to the storeroom on the first floor. The storage term was a material term of the proposed sale. The mere fact that the solicitor has approved a draft underlease, even when the defendant has approved the solicitor's approval of the draft underlease, does not amount to assent.

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[17] [1950] 2 K.B. 257.

[18] [1951] W.N. 416.

[19] Ibid. 416.

Lightman Q.C. in reply. The applicants showed their preparedness to enter into a contract by signing their part of the draft contract and so making an unconditional offer which the defendant could accept. See *per* Cohen L.J. as to the effect of unqualified offers on willingness to purchase in *Graham & Scott (Southgate) Ltd.* v. *Oxlade.*[20]

The basis of the judge's decision was that the defendant's solicitor was the defendant's mouthpiece and that he had been authorised by her to assent to those terms which were to be incorporated into the formal documents. There was, therefore, assent down to the last detail. What the judge said was that the assent had to be an irrevocable assent embodied in a contract. It is no answer now to say that there had been no assent because the defendant had a new thought three months after the basic terms had been agreed. Construing the letter of July 24, 1956, in its ordinary sense, and without any predilection, the plaintiffs have done all that was required of them to earn their commission.

Cur. adv. vult.

April 12. The following judgments were read.

UPJOHN L.J. stated the facts and continued: When an agent claims commission from a principal, there are certain principles of law applicable which cannot be doubted. First, when an agent claims that he has earned the right to commission, the test is whether upon the proper interpretation of the contract between the principal and the agent the event has happened upon which commission is to be paid. Secondly, there are no special principles of construction applicable to commission contracts with estate agents. Thirdly, contracts under which a principal is bound to pay commission for an introduction which does not result in a sale must be expressed in clear language.

Authority for these propositions is to be found in the well-known speech of Lord Russell in *Luxor (Eastbourne) Ltd.* v. *Cooper,*[1] and put in more summary form by Jenkins L.J. in *Midgley Estates Ltd.* v. *Hand,*[2] where he said : "As pointed out "over and over again in the reported cases, an agency contract "of this sort, just like any other contract, must be construed "according to its terms. One has to look at the particular

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[20] [1950] 2 K.B. 257, 265, 266.

[1] [1941] A.C. 108, 124; 57 T.L.R. 213; [1941] 1 All E.R. 33, H.L.

[2] [1952] 2 Q.B. 432, 435; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394, C.A.

"contract and see whether, according to its terms, construed in "accordance with the ordinary principles of construction, the "event has happened on the occurrence of which the commission "is expressed to be payable." Then, after pointing out that prima facie the intention of the parties is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting, he continued[3]: "That is the broad "general principle in the light of which the question of construc-"tion should be approached; but this does not mean that the "contract, if its terms are clear, should not have effect in accor-"dance with those terms, even if they do involve the result that "the agents' commission is earned and becomes payable although "the sale in respect of which it is claimed, for some reason or "another, turns out to be abortive."

Winn J., in the course of his judgment, expressed certain views which, in my opinion, run counter to the principles which I have just stated. He said[4] that he felt constrained by the philosophy of the decisions in 1951 and 1952, though not by any express direction from the Court of Appeal, to regard the introduction into the definition of the operative event upon which commission was to be earned of the phrase "prepared to enter into a contract" as a nullity. He construed those words as meaning a party who enters into a contract. With the utmost respect to the judge, that is altering the language which the parties have thought fit to employ in agreeing the contract for commission between themselves, and it seems to me to run entirely counter to the principles I have already stated. There was no ambiguity or inconsistency of language which on the usual principles of construction would entitle the court to alter the language of the contract or to reject the words used and substitute others. The judge was, I think, influenced by certain observations of Denning L.J. in *Dennis Reed Ltd.* v. *Goody*,[5] where he dealt with the construction of commission agreements dealing with those who introduce "purchasers." Denning L.J., however, was careful to confine his observations to contracts employing the word "purchasers." The moment the word "purchaser" is used, there is conjured up the idea that to earn the commission there must be a purchaser, that is one who actually buys the property. But Denning L.J. himself pointed out that he was not considering words like "prepared to

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[3] [1952] 2 Q.B. 432, 435.

[4] [1959] 1 W.L.R. 706, 711.

[5] [1950] 2 K.B. 277; 66 T.L.R. (Pt. 1) 918; [1950] 1 All E.R. 919, C.A.

"enter into a contract." He said[6]: "He must introduce 'a "'person ready, able and willing to purchase the above property "'for the sum of £2,825 or such other price to which I shall "'assent.' These words do not mean a person ready, able and "willing 'to make an offer,' or even 'to enter into a contract': "they mean a person ready, able and willing 'to purchase,' that "is, to complete the purchase."

The judge also derived assistance from the observations of Lord Goddard C.J. in *Peter Long & Partners* v. *Burns*.[7] Valuable as the observations of the noble Lord always are, they do not seem to me to help in the present case because he had to consider a different point; that is, whether the estate agent introduced "a person ready, willing and able to enter into a binding "contract to purchase" by introducing a person who entered into a voidable contract.

Finally, the judge came to the conclusion that the assent required under the terms of the commission agreement must be a legally binding assent. There, again, as a matter of interpretation of this particular contract, and for reasons which later appear, I regret that I am unable to agree with him.

I turn then to the consideration of the true interpretation of the commission contract between the plaintiffs and the defendant. It is in these terms: "We would take this opportunity of con-"firming that in the event of an introduction of a party prepared "to enter into a contract to purchase on the above terms or on "such other terms to which you may assent, you will allow us "commission on the scale of the Estate Agents' Institute."

It is clear that commission would become payable on one of two events. The first is the introduction of a party prepared to enter into a contract to purchase on the terms set out earlier in the letter. That did not happen, and it is unnecessary to consider it further. The second alternative is that commission would be payable in the event of the introduction of a party prepared to enter into a contract to purchase on such terms as the defendant might assent. That is the event upon which the plaintiffs are entitled to their commission. While these terms are ultimately indivisible and require the consensus ad idem of two parties, it is convenient for the purpose of analysis to divide it into two parts. The first limb requires the agent to introduce a party prepared to enter into a contract, and the second limb requires him to prove the assent of the defendant to the contract into which the other party is prepared to enter.

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[6] [1950] 2 K.B. 277, 287.

[7] [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25; on appeal [1956] 1 W.L.R. 1083; [1956] 2 All E.R. 207, C.A.

I am unable to read the words "prepared to enter into a "contract" as being equivalent to entering into a contract, because that is altering the language which the parties have thought fit to employ. It seems to me essentially a question of fact to decide whether the agent has introduced a purchaser who satisfies that description. Certainly there are some observations to be found in the reported cases which support the view I have just expressed.

Perhaps the closest case is *John E. Trinder & Partners* v. *Haggis*.[8] We have had the advantage of being supplied with photostat copies of the judgments in the Bar Library. The terms of the commission agreement sufficiently appear from the following extract from the judgment of Lord Evershed M.R.: "I have "once again the misfortune to differ from Denning L.J., but in "my judgment, 'willing to sign a contract' must in its context "mean and does mean 'willing to sign a contract' (that is, a "document being on the face of it an exhaustive statement of "the terms of a bargain), 'in form put to him or approved by the "'vendor.' In the present case that is exactly what [the pur-"chaser] did. He was not only willing to sign but in fact signed "a contract in the form which had been approved by the defen-"dant's legal agents duly authorised by him in that behalf. The "defendant having, nevertheless, refused to proceed with the "matter cannot now, in my judgment, escape the penalty which "flows from the fact that the plaintiffs, according as I read the "letter, have earned their commission."

The third member of the court (Roxburgh J.) delivered a judgment[9] placing the same construction upon the commission agreement as Lord Evershed M.R.

Then, in two cases where the words "ready able and willing "to purchase" have been used, Bucknill L.J. has pointed out that the agent may (if the facts are established) be entitled to commission though no contract results: see *E. P. Nelson & Co.* v. *Rolfe*.[10]

In the second case, *Dennis Reed Ltd.* v. *Goody*, Bucknill L.J. said[11] (admittedly obiter): "It seems to me that the plaintiffs "place an interpretation on the words which would in effect make

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[8] [1951] W.N. 416, C.A.

[9] Ibid. 417.

[10] [1950] 1 K.B. 139; 65 T.L.R. 494; [1949] 2 All E.R. 584, C.A.

[11] [1950] 2 K.B. 277, 283.

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"them equivalent to words such as 'upon introduction of a purchaser.' I think that the words of this clause in question are intended to give to the agents a claim to commission in circumstances which fall short of the execution of an enforceable contract on both sides. I do not think it unreasonable that house agents should try to arrange for their claim to commission to be earned in some cases where a sale through their introduction of a person willing to purchase is not in fact effected."

The words in the present case seem to me to be perfectly clear and unambiguous, though whether the person introduced by the agent satisfies that description may be a difficult question of fact in each particular case. I regretfully find myself unable to agree with the judge upon this part of the case.

Mr. Croom-Johnson for the defendant further submitted that where the negotiations are expressed to be "subject to contract," there cannot be a purchaser who is aptly described as being one who is prepared to enter into a contract until the contract is exchanged, and he relied on the case in this court of *Graham & Scott (Southgate) Ltd.* v. *Oxlade.*[12] No doubt that case did decide that prima facie a purchaser who is only prepared to negotiate subject to contract is not properly described as one who is prepared to enter into a contract. Cohen L.J., delivering the leading judgment, put it in this way[13]: "Applying that case by analogy to the case before us, I think that the agent may prove that a person whom he has introduced is willing to purchase the property by showing that that person has made an unqualified offer or expressed an unqualified intention to make an offer notwithstanding that such an offer until accepted could be withdrawn. On the other hand, if the evidence shows that the offer is qualified by a condition inserted to prevent the other party's turning the offer into a contract by acceptance, I think it impossible to say that the agent has discharged the onus which rests on him of proving that the person whom he has introduced was willing to purchase the property."

On the other hand, he recognised that each case must depend on its own particular facts, for he also said[14]: "In reaching my conclusion, I am not saying that the introduction into the preliminary arrangements of the expression 'subject to 'contract' would necessarily in all cases prevent the agent from establishing that the person he introduced was willing

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[12] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 747; [1950] 1 All E.R. 864, C.A.

[13] [1950] 2 K.B. 257, 266.

[14] Ibid. 265.

"to purchase. It clearly would not be fatal to the agent's claim "if it were introduced by the vendor in accepting an unqualified "offer; but, if it were introduced by the prospective purchaser, the "normal inference would be that he did so with a view to reserving "to himself a locus poenitentiae—conduct which seems to me "inconsistent with the view that he is a willing purchaser."

No doubt the principle established in the *Oxlade* case applied during the active negotiations between the parties and during that time the applicants could not be properly described as persons prepared to enter into a contract, for they were not making an unconditional offer. But on the facts of the present case, it seems to me that although the negotiations remained of course subject to contract, yet in fact the position had been reached by January 17, 1957, where the purchasers satisfied the test laid down by Cohen L.J. as it has in my judgment been shown that the applicants had made an unqualified offer—that is one capable of acceptance at once by the defendant.

What was the situation on January 17, 1957? The solicitor acting for the defendant had in his possession an unconditional offer by the applicants contained in a completely detailed contractual document with annexures signed by them. It is clear he had full authority to accept the offer contained in those documents by sending by way of exchange his own client's part duly executed to the applicants' solicitors and that would constitute a contract. True it is it was still an offer subject to contract, but the parties had reached a stage where at all events so far as the solicitors were concerned they were or appeared to be ad idem because the solicitors were prepared to advise their clients to sign the lengthy and complicated documents in the form and having the contents which they had so painstakingly prepared. No one was contractually bound at that stage and either party could of course have withdrawn from the negotiations until actual exchange. But it seems to me that the fact that the negotiations were all "subject to contract" had for the relevant purpose become unimportant. It merely meant that the unconditional offer made on behalf of the applicants could only be accepted in a particular way—that is, by exchange of contracts. It seems to me that here was a perfectly plain and unconditional offer capable of acceptance in that way, and I think that on the facts of this case the plaintiffs have established the first limb of the event upon which the commission is payable: that is, they have introduced a purchaser who was prepared to enter into a contract to purchase on the terms contained in the contract and its annexures which they had, in fact, signed.

But that is only one side of the medal. The commission agent has to prove that the terms so unconditionally offered were terms to which the defendant would assent. That, again, is purely a question of fact in each particular case.

I am unable to accept the judge's view that on the construction of the commission agreement "assent" meant assent by a legally binding contract, and, for this reason, that it must then follow that not only the defendant but also the applicants must be legally bound, so that to establish the event on which commission is payable the agents must prove a contract. But that is inconsistent with the other limb of the agreement because all that the commission agent has to do is to introduce a purchaser "prepared to enter into a contract" and not one who does enter into a contract. The judge is, in fact, reading the contract as though the commission became payable only upon the introduction of a party who did enter into a contract with the defendant. But those are not the words which the parties have used in their contract. Accordingly, I cannot agree to that construction of the word "assent."

Has there, then, been an assent in this case? That, again, is purely a question of fact. I can envisage circumstances such, for example, as those in *John E. Trinder & Partners* v. *Haggis*[15] or in *Eccles* v. *Bryant and Pollock*[16] where although the parties were never legally bound together, it could be strongly argued that the purchaser in signing his part of the contract satisfied the description of a person prepared to enter into a contract and the vendor was one who assented to it by signing his part of the contract though he then withdrew before exchange.

But the facts here were entirely different. Mr. Lightman argued that there had in fact been assent by the defendant for the reason that as early as December 28, 1956, the defendant plainly knew of the terms of the underlease and he urged that she must be taken to have assented to those terms. That the defendant may have seen the draft lease can be assumed, but I am quite unable to accept the argument. The solicitors had no authority to bind their clients to the terms which they were negotiating and, in fairness to them, let it be said they never purported to bind their clients. It would be an impossible situation if, during the negotiation of a complicated contract such as this, the parties for the purposes of some collateral commission agreement were to be taken to assent piece by piece to the terms as they were agreed by their solicitors, and one of the difficulties of Mr. Lightman in the present case was to fix a date upon which it could fairly be said there had been an assent by the defendant to the terms offered by the applicants. In my view, no question of assent could arise until the proposed agreement as finally approved between the respective solicitors as being proper to put before their respective clients for signature was in fact submitted to their clients. Just as it could not be suggested that the applicants satisfied the description of persons prepared to enter into the contract until they had signified such preparedness by signing their part of the contract, so, in my view, the first moment of time when any question of an assent could arise for the purposes of the commission agreement was when the defendant received the completed documents ready for signature from her solicitor. She considered them and never at any time did she give her assent to those documents because it emerged that there had been a fundamental difference of conception as to the subject-matter of the sub-lease. She never had been willing to give up all rights to occupation of every part of the first floor.

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[15] [1951] W.N. 416.

[16] [1948] Ch. 93; [1947] 2 All E.R. 865, C.A.

Accordingly, on this short ground, it seems to me clear in the present case that the plaintiffs have never established the event upon which they were entitled to claim commission because they never established that the defendant assented to the terms on which the purchaser was prepared to contract.

Later on, the defendant suggested certain terms to which she would give her assent, but unfortunately for the plaintiffs, the applicants were not prepared to enter into an agreement containing those terms. It follows, therefore, that the plaintiffs have not established that the event has happened upon which they are entitled to claim payment of the commission, and for those reasons I would dismiss this appeal.

Ormerod L.J. I agree. The appeal turns in the first place on the construction of the contract between the parties, which is contained in the letter dated July 24, 1956, from the plaintiffs to the defendant. The material paragraph is: "We would take "this opportunity of confirming that in the event of our "introduction of a party prepared to enter into a contract to "purchase on the above terms or on such other terms to which

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"you may assent you will allow us commission upon the scale "of the Estate Agents' Institute." No party prepared to enter into a contract in the terms set out in the earlier part of the letter was introduced by the plaintiffs, and the question was whether on a true construction of the above paragraph, and in the light of the evidence, the plaintiffs introduced a party prepared to enter into a contract upon the terms to which the defendant had assented.

The judge, after a careful consideration of numerous authorities cited to him, dismissed the plaintiffs' claim. He held that on a true construction of the contract between the parties the event had not happened which would entitle the plaintiffs to commission. He took the view that commission could not be earned until the parties had entered into a binding contract. He said,[17] "I am now constrained, not by any express direction "from the Court of Appeal but by the philosophy implicit in the "judgments in the cases decided in 1951 and 1952, to regard "the phrase 'prepared to enter into' as a nullity, if that phrase "is sought to be construed against the owner of the property. "One must ignore any such phrase as 'prepared to enter into' "and construe the document as a matter of law as though it did "not contain those words but read 'a party who enters into a con-"'tract' in place of 'a party prepared to enter into a contract.'" Again he said[18]: "I hold that this phrase 'introduction of a party "'prepared to enter into a contract' means, as a matter of con-"struction, precisely the same as 'introduction of a party who "'does enter into a contract'"; and later, "it is necessary to "have the one clear and undoubted criterion: has there been a "contract?"

I find myself unable to agree with the view which the judge has taken. It is well established that a contract of agency of this type must be interpreted according to the ordinary rules of construction, and if, on a proper construction of the contract commission is payable before the purchase is completed or if the purchase never is completed, there is no reason in such circumstances why an agent should not succeed in establishing a claim for such commission. In considering the matter, however, it is well to have in mind the words of Lord Russell of Killowen in *Luxor (Eastbourne) Ltd.* v. *Cooper*[19]: "It is "possible that an owner may be willing to bind himself to pay a

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[17] [1959] 1 W.L.R. 706, 711.
[18] Ibid. 711, 712.
[19] [1941] A.C. 108, 129.

"commission for the mere introduction of one who offers to "purchase at the specified or minimum price; but such a "construction of the contract would in my opinion require clear "and unequivocal language."

Applying the ordinary rules of construction and bearing in mind this warning, the contract in the present case does not appear to me to be sufficiently clearly expressed to warrant the construction for which the plaintiffs contend. I can find no justification, with all respect to the judge, for holding that the words "prepared to enter into a contract" mean the same as "introduction of a party who does enter into a contract." The words would not, in my view, be so construed in any other class of contract, and so to construe them in this case appears to be applying some special rule of construction to estate agents' contracts.

In *John E. Trinder & Partners* v. *Haggis*,[20] a case which came before this court on July 21, 1951, the relevant words in the contract for commission were: "In the event of us being "successful in introducing a person willing to sign a contract "to purchase at an agreed price, you will pay us the usual scale "commission." It was held, Denning L.J. dissenting, that the agents were entitled to their commission, even though the sale eventually went off altogether. Lord Evershed M.R., after referring to the passage in the speech of Lord Russell of Killowen in the *Luxor* case,[21] to which I have already referred, said [22]: "I take that passage as a sufficient statement of the relevant "law which is now well established, and I take it to be true "that if commission is to be attracted at any stage prior to the "coming into existence of a binding contract, it must be so "provided in clear terms." Later in his judgment, Lord Evershed M.R. said: "It is no doubt upon a close analysis "possible to create doubts and ambiguities in the language used, "but it is, I conceive, the duty of the court to give a meaning "to the relevant words, if reasonably possible to do so, and "not lightly to conclude that the words are too uncertain and "vague to be capable of making an enforceable bargain." It is true that in *Dennis Reed Ltd.* v. *Goody* Denning L.J. said [23]: "I "can see no sensible distinction between instructions to 'find "'a purchaser,' 'find a party prepared to purchase,' 'find a "'purchaser able and willing to complete the transaction,' and

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[20] [1951] W.N. 416.

[21] [1941] A.C. 108, 129.

[22] [1951] W.N. 416, 417.

[23] [1950] 2 K.B. 277, 288.

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"'find a person ready, willing and able to purchase.' The rights "and liabilities of house owners in these cases should not depend "on fine verbal differences." It may be that the judge had in mind this and other similar passages from the judgment of Denning L.J. when he considered the present case, but it is to be observed that Denning L.J. went on to say[24]: "If estate agents desire "to get full commission not only on sales, but also on offers, they "must use clear and unequivocal language." In my judgment, the language here is clear and unequivocal. The words "pre-"pared to enter into a contract" appear, without any straining of language, to bear the meaning that commission will be earned when a party fulfilling the necessary conditions is introduced, and not, as the defendant contends, and as the judge found, only when a binding contract is entered into.

If that is the proper construction of the contract, it remains to consider whether the plaintiffs did introduce a party prepared to enter into a contract on terms assented to by the defendant. Mr. Lightman contended that the necessary conditions had been fulfilled. He pointed out that the time came when all the details of the contract had been agreed between the respective solicitors and the applicants had actually signed their part of the contract and forwarded it through their solicitors to the defendant's solicitor together with the balance of the deposit. This, he contended, must be conclusive evidence of the applicants' preparedness to enter into a contract. Mr. Croom-Johnson, on the other hand, contended that the commission could not be earned, as the judge found, until the contract had been signed by both parties and the respective parts had been exchanged. The offer made by the applicants was "subject to contract" and, therefore, neither party could be bound until a binding contract was executed: see *Chillingworth* v. *Eshe*.[25] There is no doubt that an offer "subject to contract" is not evidence that the person making the offer is "willing" to purchase the property. The offer must be a firm one and not one subject to a condition: see *Graham & Scott (Southgate) Ltd.* v. *Oxlade*,[26] where the wording of the contract was: "We confirm that "in the event of our introducing a person or persons willing "and able to purchase we shall look to you for the payment of "the usual commission. . . ." An offer was made which was

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[24] [1950] 2 K.B. 277, 288.

[25] [1924] 1 Ch. 97; 40 T.L.R. 23, C.A.

[26] [1950] 2 K.B. 257.

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expressed to be "subject to contract, satisfactory survey." It appeared from the evidence that the words "subject to "contract" had been inserted by the agent, but that the words "satisfactory survey" were put in at the instance of the purchaser. It was held that the agent was not entitled to commission as an unconditional offer had not been made. Cohen L.J. said[27]: "In reaching my conclusion, I am not saying "that the introduction into the preliminary arrangements of the "expression 'subject to contract' would necessarily in all cases "prevent the agent from establishing that the person he intro- "duced was willing to purchase. It clearly would not be fatal "to the agent's claim if it were introduced by the vendor in "accepting an unqualified offer; but if it were introduced by "the prospective purchaser, the normal inference would be that "he did so with a view to reserving to himself a locus penitentiae "—conduct which seems to me inconsistent with the view that "he is a willing purchaser."

It is to be remembered in considering the present case that the contract, under which the claim is made, is not between vendor and purchaser. It is between the agent and the vendor. The two questions which have to be decided are (1) were the applicants prepared to enter into a contract to purchase on certain terms, and (2) were those terms assented to by the defendant. I have no doubt that the first question should be answered in the affirmative. It is true that in the first place the offer was subject to contract and therefore conditional, but by January 17, 1957, all the details had been agreed to the satisfaction of the applicants who had actually signed their part of the contract, and paid the balance of the deposit. At that time the conditional offer became, in my judgment, an unconditional one, and the only question which remains is whether the terms of the offer were assented to by the defendant. I have come to the conclusion that there was no assent by the defendant. It is not suggested that at any time her solicitor was acting otherwise than within his instructions. He discussed from time to time with the applicants' solicitors the various terms of the transaction, which was more complicat than usual since not only were the terms of a mortgage to b arranged, but there was also to be a lease of part of the premises to the defendant's husband. Eventually the transaction was embodied in the necessary documents, but there is no evidence that the defendant's solicitor had authority to assent on behalf of his client to the terms of the documents. The true position appears to be that the form of the documents was agreed between the solicitors, but that it was still necessary to obtain the final assent of the defendant to the terms. I have no doubt that the defendant's solicitor anticipated that this would be forthcoming when he sent the documents to the defendant on January 14 with a letter in which he said: "if necessary I shall be pleased "to discuss the documents with you." He attended on the defendant and her husband on January 18, when a further question was raised which had apparently been overlooked up to that time, with the result that the transaction after some further negotiations went off. The position therefore appears to be that when the defendant's solicitor sent the documents to the defendant, there had been no final assent, but that the documents were sent to her for her consideration with a view to her assent being given. Assent was not given, and therefore the event did not happen which would have entitled the plaintiffs to their commission.

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[27] [1950] 2 K.B. 257, 265.

I would dismiss the appeal.

ORMEROD L.J. I have been asked to read the judgment of Sellers L.J.

SELLERS L.J. (read by Ormerod L.J.). I agree with my Lords that this appeal fails and should be dismissed. I have nothing to add to what has been said on the facts of the present case which show no assent by the defendant.

In view of some of the observations of the judge, I would, however, quote a brief extract from the speech of Lord Russell of Killowen in *Luxor (Eastbourne) Ltd.* v. *Cooper*,[28] which puts some essential and established considerations concisely: "A "few preliminary observations occur to me. (1) Commission "contracts are subject to no peculiar rules or principles of their "own; the law which governs them is the law which governs all "contracts and all questions of agency. (2) No general rule can "be laid down by which the rights of the agents or the liability "of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms "of the contract in question, and upon the true construction of "those terms. And (3) contracts by which owners of property, "desiring to dispose of it, put it in the hands of agents on

[28] [1941] A.C. 108, 124.

"commission terms, are not (in default of specific provisions) "contracts of employment in the ordinary meaning of those "words. No obligation is imposed on the agent to do anything."

Although the judge expressed himself in language wider perhaps than I would use, I am not at present satisfied that he was wrong in his conclusions and that circumstances could arise, under such an agreement as this, where commission would be payable where the assent of the defendant, which the agreement requires, could be an assent which fell short of concluding a bargain with the applicants. The assent, which the commission agreement requires, is clearly an assent to the offer which the agent has obtained. An assent to an unqualified offer would conclude a bargain and commission would be payable. Can an assent not communicated as an acceptance of his offer to the proposed purchaser (whose offer must to meet the first requirement of the event be unqualified), be treated as an assent which entitled the agent to commission? I am not convinced that it could and would reserve consideration of it should it arise on another set of facts.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Pratt & Sidney Smith; R. C. de M. Blum.*

N. P.

REGINA *v.* BARNSLEY LICENSING JUSTICES. *Ex parte* BARNSLEY AND DISTRICT LICENSED VICTUALLERS' ASSOCIATION AND ANOTHER.

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1960
May 16, 17, 18.

Lord Evershed M.R., Ormerod and Devlin L.JJ.

Justices — Bias — Licensing — Pecuniary interest — Application for off-licence by co-operative society—Justices members of co-operative society—Whether pecuniary interest conclusive of bias—"Profits of "premises"—Meaning—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 48 (4) (5).

Statute — Construction — Re-enactment of section — Judicial opinion expressed meanwhile as to meaning—Licensing Act, 1953, *s.* 48 (5) (post, pp. 178–179, 185).

An application for a spirits off-licence at a drug department was granted to a co-operative society by seven licensing justices, six of whom were members of the co-operative society. On a motion for an order of ceriorari to quash the decision on the ground that the justices had a pecuniary interest in the matter under consideration and therefore were disqualified under section 48 of the Licensing Act, 1953,[1] it appeared that the pecuniary interest alleged was that the justices, as members of the society, were entitled under the rules of the society out of its profits to what was called "a dividend," calculated by reference to the amount of their purchases. It was further suggested that the fact that the chairman of the bench of justices had stood for election as one of the directors of the society raised a presumption of bias distinct from pecuniary interest. On appeal against the decision of the Divisional Court refusing the application:—

Held, dismissing the appeal, (1) that the "dividend" received by members of the society in respect of their purchases did not amount to a discount, but that they were interested in the "profits "of the premises" for which a licence was sought within subsection (4) of section 48 of the Licensing Act, 1953.

(2) That, having regard to the provisions of subsection (5) of section 48, if the only disqualification of the justices was that they had in fact an interest within subsection (4) in the profits of the business carried on at the premises, that interest would not of itself invalidate the justices' determination.

Rex v. *Tempest* (1902) 86 L.T. 585; 18 T.L.R. 433 applied.

Reg. v. *Rand* (1866) L.R. 1 Q.B. 230 distinguished.

Rex v. *Sunderland Justices* [1901] 2 K.B. 357; 17 T.L.R. 551, C.A. considered.

(3) That, on the facts, there was no real likelihood of bias on the chairman's part.

Decision of the Divisional Court [1959] 2 Q.B. 276; [1959] 3 W.L.R. 96; [1959] 2 All E.R. 635, D.C. affirmed.

APPEAL from the Divisional Court.[2]

The applicants, the Barnsley and District Licensed Victuallers' Association and the Barnsley and District Off-Licence Holders' Protection Association, applied for certiorari to quash a decision of the Barnsley County Borough Licensing Justices granting to

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[1] Licensing Act, 1953, s. 48: "(4) "No justice shall act for any purpose "under this Act in a case that con"cerns any premises in the profits of "which he is interested, or of which "he is wholly or partly the owner, "lessee, or occupier, or for the owner, "lessee, or occupier of which he is "manager or agent: Provided that a "justice shall not be disqualified under "this provision by reason of his having "vested in him a legal interest only, "and not a beneficial interest, in the "premises concerned or the profits of "them. (5) No act done by any jus"tice disqualified by this section shall "be invalid by reason only of that "disqualification, and no act done by "any justice who by virtue of this "section has ceased to be a member "of any licensing committee or con"firming authority shall be invalid by "reason only of the cessation of mem"bership. . . . (7) No objection shall "be allowed to any justices' licence "on the ground that it was granted "or confirmed by justices not qualified "to grant or confirm it."

[2] [1959] 2 Q.B. 276; [1959] 3 W.L.R. 96; [1959] 2 All E.R. 635, D.C.

Robert Murray of the Barnsley British Co-operative Society Ltd. his application for a spirits off-licence at the Central Drug Department, Wellington Street, Barnsley.

The grounds of the application were that one or more of the licensing justices, who made the decision, was a member of the Barnsley British Co-operative Society Ltd., and (a) had a financial interest therein and was thereby disqualified by section 48 of the Licensing Act, 1953; (b) was thereby disqualified by bias.

The Divisional Court (Lord Parker C.J. and Donovan J., Salmon J. dissenting) refused the application.

Christmas Humphreys Q.C. and *H. C. Beaumont* for the applicants. The respondents have not appealed against the decision of the Divisional Court that the justices were disqualified from acting by subsection (4) of section 48 of the Licensing Act, 1953, on the ground that they are interested in the profits of these premises. The first question is whether subsection (5) of section 48 destroys the basic common law principle stated by Blackburn J. in *Reg.* v. *Rand* [3] that any pecuniary interest, however small, disqualifies a person from acting as a judge. Lord Parker C.J. and Donovan J. concluded that subsection (5) had destroyed that principle. Salmon J., on the other hand, held that the subsection had not done so. The first three subsections of section 48 do not apply to this case. Subsection (4) is the section which disqualifies these justices from acting. Subsection (5) does not, like the earlier subsections, refer to the justices but to acts done by them. This subsection is intended to protect licensees who act under a licence granted by justices who are disqualified and whose licences may be invalid because of the infringement of subsection (4).

The applicants' first point is that these justices having an interest in the profits of these premises, there is an irrebuttable presumption of bias and the principle of *Reg.* v. *Rand* [3] applies. That decision was given before the passing of the Licensing Act, 1872, section 60 of which was in similar terms to section 48 of the Act of 1953. *Rex* v. *Sunderland Justices* [4] was decided after the passing of the Act of 1872, and there it was not suggested that the principle of *Rand* [5] had been affected. [Reference was made to *Reg.* v. *Meyer*.[6]]

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[3] (1866) L.R. 1 Q.B. 230, 232.

[4] [1901] 2 K.B. 357; 17 T.L.R. 551.

[5] L.R. 1 Q.B. 230.

[6] (1875) 1 Q.B.D. 173.

In Halsbury's Laws of England, 3rd ed., vol. 25, p. 132, para. 239, which was published seven years after the passing of the Licensing Act, 1953, the law is stated as it was laid down in *Rand*.[7] There is no suggestion that the common law principle has been altered. It is now 90 years since *Rand*[7] was decided and the principle of the decision has never been attacked. Salmon J. is right in considering that subsection (5) is limited to protecting licensees who act under a licence granted by a disqualified justice and protects justices liable to a fine under subsection (6) of section 48. To hold that subsection (5) destroys the irrebuttable presumption of *Rand*[7] would be to hit the basic common law principle that justice must be seen to be done. In this case justice is not seen to be done by the man in the street. His view that there is here a likelihood of bias must not be disregarded. It cannot be said that there is no bias where a man is a judge in his own affairs. The decision in *Rex* v. *Tempest*[8] was not a decision on subsection (4) and is not relevant to this case.

Lastly, on the facts, the court should say that there is here a real likelihood of bias. These magistrates had here a pecuniary interest.

H. C. Beaumont following. Where a statute has a restricted object in view, there is a presumption against it ousting an established rule of law. [Reference was made to Maxwell on the Interpretation of Statutes, 10th ed., Chap. 3, Halsbury's Laws of England, 3rd ed., vol. II, p. 67, and to *Dimes* v. *Grand Junction Canal (Proprietors)*.[9]]

John Thompson Q.C. and *John McLusky* for the respondents. It is not disputed that these justices were disqualified by reason of subsection (4). The question is as to the effect of such disqualification. While the magistrates have an interest in the profits of these premises, they have no direct pecuniary interest in the result of the application for a licence. As a purchasing member of the society each magistrate under the rules of the society is entitled to a share in the society's profits in the form of a dividend. They have an interest in the profits of these particular premises within subsection (4). They have no other interest. The trade in spirits is not so large that it would put up the turnover so as to increase the dividend. Unless there is some other ground for disqualification apart from subsection (4), the act of the magistrates was not invalid. It is saved by subsection (5).

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[7] L.R. 1 Q.B. 230.

[8] (1902) 86 L.T. 585; 18 T.L.R. 433.

[9] (1852) 3 H.L.C. 759.

Subsections (4) and (5) have to be read together. If, apart from subsection (4), these magistrates had a pecuniary interest, that would mean that there was a real likelihood of bias and subsection (5) would not save their acts from invalidity. There is here no real likelihood of bias. Even if there were a possibility that Alderman McVie, the chairman of the bench, who had stood for election as a director of the society, might be biased, he was one of seven and it would have to be shown that his assumed bias was so manifest as to influence the decision of the other magistrates. No actual intention to act improperly was alleged. [Reference was made to Paterson's Licensing Acts, 68th ed., p. 681; *Reg.* v. *Handsley* [10]; *Reg.* v. *Hertfordshire Justices* [11] and *Reg.* v. *Cheshire Licensing Justices*.[12]] The real question is whether there is here any real likelihood of bias. The onus is on the appellants of establishing such bias. They had not discharged that onus.

Christmas Humphreys Q.C. in reply. There are here two grounds of appeal. There is first the question of pure law as to the effect of subsection (5). Secondly, there is the question whether there is here a real likelihood of bias. If there is, certiorari lies, even if the point of pure law fails.

It is submitted on the authority of *Rand* [13] that an interest, however small, disqualifies absolutely. That decision was followed in *Rex* v. *Sunderland Justices*.[14] The reason why this point has not been raised before is that bias is so gravely regarded that no one would question the principle of *Rand*.[15]

With regard to subsections (4) and (5), the evidence shows that the justices here had an interest beyond a mere interest in the profits of these premises. The result of the society's rules is that its members can buy spirits at a cheaper rate than ordinary members of the public. Subsection (5) is limited in its operation to protecting licensees.

On the facts, there is here a real likelihood of bias. These magistrates had such a pecuniary interest that bias must be presumed. Where an entire bench consists of members of the applicant society, to the man in the street justice would not be seen to be done. The Court of Appeal should put themselves

[10] (1881) 8 Q.B.D. 383.

[11] (1845) 6 Q.B. 753.

[12] [1906] 1 K.B. 362.

[13] L.R. 1 Q.B. 230.

[14] [1901] 2 K.B. 357.

[15] L.R. 1 Q.B. 230.

into the mind of the ordinary man in respect of whom the law operates. In the case of the chairman there must be some bias. If that is correct, it must be assumed that the bias of the one will contaminate the other justices. The court is asked to say that the view of Salmon J. was right and to allow this appeal.

Lord Evershed M.R. This appeal from a judgment of the Divisional Court raises a question of difficulty and certainly poses for the town of Barnsley some serious problems which the court, I fear, cannot solve. The appeal is against an order rejecting an application by the Licensed Victuallers' Association for an order of certiorari to quash the decision of the Licensing Justices of Barnsley, given in March, 1959, whereby they granted to the respondents, the Barnsley British Co-operative Society Ltd., a spirits off-licence in a chemist's shop or drug store which already belonged to them, in the sense that they had a tenancy or lease of the premises and carried on thereon this chemist's business. They also had a wine off-licence for the same premises.

The problem has arisen for this reason: When the justices sat on March 6, 1959, they were seven in number. Six of them were members of the co-operative society and the seventh was a lady whose husband was a member. The chairman of the bench, Alderman McVie, was one who had some months before offered himself as a candidate for election to the board of directors of the society, in which enterprise, however, he was unsuccessful. It appears that he was the third of nine unsuccessful candidates. There was no evidence that he intended at the relevant date to offer himself again. It is right to say, as Mr. Christmas Humphreys has made clear, that in this case there has been no suggestion whatever that any of the seven justices acted in fact with any improper or partial motive. What is said is, first, that their "interest," as has been found, was such that, apart from any language in the Licensing Act, 1953, the common law disqualified them altogether from acting in the matter. Alternatively, it is said that even if the interest they had was one which might otherwise be regarded by the court as protected by subsection (5) of section 48 of the Act, still there was a real likelihood of bias, which deprived them of any right to rely, as they might otherwise do, on the subsection.

I leave aside for the moment the separate point, which arose about Alderman McVie, on which Salmon J. fastened in his dissenting judgment.

The interest of the seven justices, the members of the society—

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I shall not henceforth distinguish between the six who were themselves members and the lady whose husband was a member—was that as shareholders and as members of the society they were entitled to receive, according to the constitution and rules of the society, certain dividends on the amount of their shares. In addition, by virtue of sub-rule 6 of rule 18, they were entitled to what is popularly called a "dividend" out of the remaining profits calculated in this fashion: Sub-rule 6 of rule 18 provides: "The remainder of the net profits after providing for the preceding "charges"—including, for example, a provision for an educational fund—"shall be divided between the members who have made "purchases of the society during the period to which the division "relates according to the amount of their purchases."

It will be noted that the dividend referred to in sub-rule 6 was not arithmetically related to the amount of the shareholding. It was arithmetically related to the amount of the purchases made, and all the members had similar dividends, if they made the same amount of purchases, regardless of any difference there might be in respect of their shareholding. It is clear enough that there would have to be profits, before such a dividend could be paid. We were informed—and it appears from the evidence—that at the relevant dates it worked in this fashion, that at certain periods (I believe, quarterly) there was paid, pursuant to sub-rule 6, to the members, a dividend, a division of profits, at the rate of 1s. 6d. for every 20s. worth of purchases. It would follow that, if any member of the society in fact purchased spirits at this drug store (if a licence had been granted for the sale of those spirits), they would get a dividend which would consist of or include a sum at the rate of 1s. 6d. in 20s. for the sum paid to buy the spirits. Roughly, we were told—and no doubt the calculation is right—it meant that any member of the society who bought a bottle of whisky at this store would get in his dividend a sum of 2s. 9d. in respect of that bottle of whisky.

One of the questions which must be considered is this: Does such a member of the society get a discount on his purchase? Is he in the position of being able to buy at the co-operative shop, with which we are concerned, a bottle of whisky at 2s. 9d. less than the ordinary man would have to pay if he bought a bottle of whisky in an ordinary retail establishment, or less than a man would pay who bought a bottle of whisky at this shop but who was not a member of the society? For my part—and I conceive this is a somewhat important point—I conclude that it is not right to say that a member of the society is able to buy from the

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society's store whisky at 2s. 9d. per bottle less than the retail price. If the contrary was true, it would perhaps be a determining factor in this case; for in such case there would be a pecuniary interest which had nothing to do with profits. But my view is that the interest which the justices had in this matter cannot be put higher than that they were interested in the profits of any trade or business carried on upon the premises occupied by the society. That is a pecuniary interest, and I say at once, that, apart from section 48 of the Act of 1953, I should not doubt that, having that kind of interest, they would fall within the scope of the principle laid down in 1866 by Blackburn J. in *Reg.* v. *Rand*,[1] which Mr. Humphreys has put in the forefront of his argument.

The facts in *Rand's* case [1] need not be referred to in detail. It concerned a water undertaking, and it was suggested, unsuccessfully, that certain justices were disqualified because they were interested in certain bonds which had been issued in connection with the water works. As the court held they had in truth no pecuniary interest themselves in the subject-matter of the decision impugned, it was held that they were not disqualified; but the principle applicable in such cases is stated in clear language, often quoted, by Blackburn J. in delivering the judgment of the court. He said [2]: "There is no doubt that any direct pecuniary interest, "however small, in the subject of inquiry, does disqualify a "person from acting as a judge in the matter; and if by any "possibility these gentlemen, though mere trustees, could have "been liable to costs, or to other pecuniary loss or gain, in conse"quence of their being so, we should think the question different "from what it is." In that case the court held that the persons in question were not disqualified.

That principle has often been affirmed and Mr. Humphreys cited *Rex* v. *Sunderland Justices*,[3] decided in this court in 1901. I need not take time to cite again the passage which Mr. Humphreys quoted. I do not forget that in 1901 the first of the Licensing Acts, the Act of 1872, had been passed, which is the ancestor of the present Act.

Having said that much, I turn next to the relevant section, section 48 of the Licensing Act, 1953. The first four subsections formulate the disqualifying circumstances. Subsection (1) provides: "No justice shall act for any purpose under this Act . . . "or be capable of being appointed or being a member of any

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[1] (1866) L.R. 1 Q.B. 230.

[2] Ibid. 232.

[3] [1901] 2 K.B. 357; 17 T.L.R. 551, C.A.

"committee, therein for any such purpose, [in any county or "borough] who is, or is in partnership with, a brewer, distiller, "maker of malt for sale or retailer of malt or of any intoxicating "liquor, in that county or borough." Subsection (2) similarly disqualifies justices who hold shares or stocks in a company which carries on a business of the kind I have indicated. In that subsection there is, however, a proviso that a member disqualified by reason of being a stockholder may be reappointed if he makes disclosure before his reappointment. Subsection (3) similarly disqualifies one who, though not being himself a shareholder or stockholder at the time he is appointed, is beneficially interested in shares or stocks vested in somebody else's name. Again, there is a proviso which protects him in the case of his interest being so small that there is no reasonable ground for suggesting that he is not a proper person to be a member of the authority. It will be seen that so far the disqualifications formulated are disqualifications of persons, who have a particular interest in particular businesses, whether or not the particular business, for example, brewery, in which they happen to have shares, has any direct concern with the application for the licence which comes before the justices; in other words, they are quite general.

Subsection (4), which is the vital one for this purpose, is, on the other hand, strictly limited to the premises the subject of the application for a licence. It reads as follows: "No justice "shall act for any purpose under this Act in a case that concerns "any premises in the profits of which he is interested, or of "which he is wholly or partly the owner, lessee, or occupier, or "for the owner, lessee, or occupier of which he is manager or "agent." There is a proviso to protect any person whose interest is that of a trustee only. There was some discussion before us on the meaning of the words "premises in the profits of which "he is interested." If the subsection were strictly limited to the profits of the premises, it would be confined to persons whose only concern was in any profit, rental or similar benefit which the premises themselves might confer. But there is a distinction between the words "any premises in the profits of which he is "interested" and the later words "or of which he is wholly or "partly the owner, lessee, or occupier." Therefore I have no difficulty in agreeing with the majority of the Divisional Court that the former phrase means in its context, interested "in the "profits of the trade or business carried on upon the premises."

In my judgment these justices were interested in the profits of the premises here in question, in the sense contemplated by the section. Of course, if the society itself makes no profits at all over the whole of its commercial undertaking, then there could be no dividend payable, even though this particular shop itself was conducted profitably. Conversely, they would be entitled to a dividend if the whole society earned distributable profits even though this drug store made no contribution to those profits. Nonetheless, it could not, I think, be said that they were not interested in the profits which the trade in these premises would or might produce, and I agree with the Divisional Court who thought that these justices were certainly comprehended by subsection (4).

But the question then arises—Is the nature of their interest one which is broader than that comprised in the language of subsection (4)? It is for this reason that I have expressed my conclusion first on the question whether they had a pecuniary interest in the subject of the application, in the sense that they would be able as members of the society, if the licence was granted, to get whisky at a discount of 2s. 9d. as compared with the ordinary retail shop. As I have said, I do not think that is so. If it were, then it would appear to me that their interest would be one which was wider than the interest in profits against which alone subsection (4) is directed.

Salmon J., as I follow his judgment, did take the view, which I have not myself accepted, that their interest was or included being able to buy whisky at a discount; for he said[4]: "The "present applicants now know that the justices by granting the "licence obtained the advantage of being able to buy a bottle "of gin at about half a crown and a bottle of whisky at about "2s. 9d. below the retail list prices at the society's central drug "department. It may be argued that the sum involved is small, "but to any ordinary mortal the advantage is a very real one." If that is right, it is an advantage which they possessed apart from any profits which might be made. But I have given my reasons for agreeing with Lord Parker C.J. and Donovan J. in rejecting that view. I reach the same result which appealed to the majority of the Divisional Court, namely, that the interest which these justices had was a pecuniary interest, but one falling within the compass, and strictly within the compass, of subsection (4). It follows nonetheless that these justices were disqualified. But then we come to subsection (5) which provides:

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[4] [1959] 2 Q.B. 276, 286; [1959] 3 W.L.R. 96, 104; [1959] 2 All E.R. 635, 641.

"No act done by any justice disqualified by this section shall be "invalid by reason only of that disqualification."

I think it right, though fortunately I need not express any view about it, to refer to subsection (7): "No objection shall be "allowed to any justices' licence on the ground that it was "granted or confirmed by justices not qualified to grant or con- "firm it." The purpose of that subsection was not debated before the Divisional Court but its subject-matter was mentioned here. If the widest meaning is given to that subsection, it might cover every case in which a licence is granted by justices who for any reason were not qualified to grant it. If that were the meaning, it would make subsection (5) quite otiose, and I cannot therefore think that subsection (7) should be given so wide a scope. But, as it is unnecessary to express any concluded view about subsection (7), I do not do so and I say no more about it. I have thought it right to mention it because it was referred to in the argument.

I come back therefore to subsection (5), which is the kernel of the matter: "No act done by any justice disqualified by this "section shall be invalid by reason only of that disqualification." The first problem is—what is meant by the words "No act "done"? The argument of the applicants in this court and below was that the words apply only to the actual sales which might be conducted in the belief that there was a valid licence in the licensed premises; in other words, that the subsection was inserted to protect the licensee or the publican from possibly very severe penalties for selling intoxicating liquors in premises which in truth were not properly licensed. The argument of counsel for the applicants was put in this fashion in the court below as I gather from the Lord Chief Justice's judgment[5]: "Mr. Beaumont, for the applicants, contends that this sub- "section in no way affects the grounds on which certiorari will "lie. It is only, he submits, a provision to ensure that unless and "until the decision granting the licence is set aside, it shall remain "and be treated as valid." On the other hand, as the Lord Chief Justice recites, it was argued for the respondent that the effect "is "to oust the remedy by way of certiorari on the ground of pecuni- "ary interest, be that interest large or small. Only in the event of "the likelihood of bias arising, otherwise than from pecuniary "interest, will certiorari lie." The majority of the court rejected both those arguments, and I agree with them. I think that the

[5] [1959] 2 Q.B. 276, 281.

words "No act done by any justice" mean what they say and cover an act done by a justice, as such, including his participation in the grant of a licence. "No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification"; "that disqualification" means, and I think must mean, disqualification under (but only under) one or other of the provisions of section 48. For that view there is, in my judgment, authority in *Rex* v. *Tempest*,[6] to which I shall make further reference. It comes back then to this, as I see it: If the disqualification is limited to a disqualification according to the terms of one or other of the subsections, and nothing more, then that alone will not invalidate the licence which has been granted. Applying that conclusion to the facts in this case, it follows, in my judgment, that, if the only disqualification is that these justices had in fact an interest in the profits of the business carried on or intended to be carried on at this particular drug store, that fact alone would not be sufficient to invalidate the licence. But if it was shown that in addition to having that interest in the profits there was evidence of real bias, the matter might go the other way. It is not claimed that there is here any question of bias in fact. All that there is before the court is the interest, which it is shown that these persons had because they are members of the society, and therefore entitled, as such, with other members, to dividends paid out of the distributable profits.

It was contended, as I followed it, that when you get to matters of pecuniary interest there is nothing really which qualifies the old-established rule formulated by Blackburn J. in *Reg.* v. *Rand*,[7] and it is true to say that there is no reported case in which it has been laid down or held that the protection of subsection (5) arises where the disqualification has arisen by virtue of subsection (4). That brings me to the reference, which I anticipated, to *Rex* v. *Tempest*.[8] The case there did not arise under the present Act because, of course, it was decided more than half a century before the Act was passed. But it did arise under analogous provisions of the Licensing Act, 1872. The Act of 1872 contained, in a proviso to section 60 (3), words which closely correspond to the opening language of subsection (5) in the present case. The words in the older Act were these: "No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid." The only difference, except for the order in which the words are used, is

[6] (1902) 86 L.T. 585; 18 T.L.R. 433.

[7] L.R. 1 Q.B. 230.

[8] 86 L.T. 585.

the present substitution of the word "that" for the word "such"; but the result in meaning is clearly the same. In the *Tempest* case[8] it appears that one of the magistrates, who was present, was a shareholder in a brewery, known by the name of Allsopp and, therefore (it was said), he was disqualified, having such an interest, by virtue of what corresponds to subsection (2) of section 48 of the present Act. Lord Alverstone C.J. upon that point said[9]: "The point we have to consider is whether the "licence is bad because he adjudicated upon it notwithstanding "the provisions of that section. The true meaning of the proviso "at the end of that section is not without difficulty." Then after citing the words, he said: "It was argued by Mr. Hextall that "comparing that with the analogous provision in section 38, it "meant to say that no objection should be taken to the sale of "liquor in that case, acting under the licence, and if the question "had arisen solely under section 38, I think that there would be "some ground for that argument. But when you look at the "actual language of section 60, which creates the status of dis-"qualification, it says that," and then he quotes again the language of the section: "In my opinion it is impossible to put "such a limited construction as that contended for. I think "that the words of the Act here occurring in the proviso to a "section creating a disqualification against the doing of the act, "and creating a penalty, cannot be construed so narrowly; that "is to say, that the act was not intended to be protected if that "was the only disqualification. I would further point out that "this proviso would be no protection where a case of actual bias "was raised—where it is said that the interest of the brewer is "such that he would be biased. In that case, of course, the "section would not be wanted, but it is quite plain to my mind "that the section saying 'by reason only of such disqualification' "means thereby what I may call the technical disqualification "created by the Act."

I quite agree that was a case relevant to what corresponds to subsection (3) and not subsection (4), but the meaning and effect of subsection (5) cannot differ in what I may call a subsection (4) case from its meaning and application in a case arising under an earlier subsection. It therefore follows that if the disqualification is limited to the fact that the person concerned had an interest in the profits of the kind stated in subsection (4), then that alone does not render the decision invalid. I agree, therefore, with the decision of the majority of the Divisional Court, that to that extent the subsection ousts the rule of law enunciated in *Reg.* v. *Rand.*[10] That conclusion does not mean, however, that the general rule of law is altogether superseded. All it means is that in a case which falls within the rule in *Reg.* v. *Rand,*[10] but also is within the scope or limit of subsection (4), the pecuniary interest will of itself, notwithstanding the common law rule, not render invalid the justices' determination by reason of the words of subsection (5). I agree with Salmon J. in his dissenting judgment that *Rex* v. *Tempest*[11] did not decide this precise point, but, nevertheless, I think that the construction put upon subsection (3) of section 60 of the Act of 1872 is authority for the view which I take of the meaning and effect here of subsection (5) of section 48 of the Act of 1953. I therefore agree with the view of the majority of the Divisional Court upon this matter.

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[8] 86 L.T. 585.

[9] Ibid. 587.

I now turn to the special circumstances relating to Alderman McVie. He was chairman of the bench, and he was one who had unsuccessfully stood for election to the board of the society. That is all we know. There are no other relevant facts found, and once more, Mr. Christmas Humphreys with characteristic fairness disclaimed any suggestion that Alderman McVie was influenced by a desire to obtain promotion in the society and put himself in the position of being elected to the board if he stood again. Salmon J. upon this particular point used this language: After stating his appreciation of the effect of the members' right to obtain whisky at a discount and saying there was no reason to assume that all the justices were teetotallers, he proceeded thus[12]: "Further, the present applicants might reasonably conclude that Alderman McVie's future prospects of election to the society's board of directors would not be enhanced if a justices' meeting, of which he was chairman, refused the society's application for an off-licence." If that view be justified, it is tantamount to saying that there was here in fact a real bias or real evidence of likelihood of bias, and, no doubt, a bias quite distinct from any pecuniary interest which Alderman McVie might have merely as a member of the society. The position of Alderman McVie is not referred to, so far as I can discover, in the judgment of the majority of the Divisional Court. No special point was there made about him, and I rather gather that the circumstances relating to Alderman McVie, which Salmon J. was relying on, were not presented as a special ground to the

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[10] L.R. 1 Q.B. 230.

[11] 86 L.T. 585.

[12] [1959] 2 Q.B. 276, 286.

Divisional Court for granting the order of certiorari. The test, I conceive, is objective. Was there in fact in his case real likelihood of bias? As I have already said, it is not suggested that Alderman McVie was in fact proposing to stand again or had any interest concerning his own promotion in the society in getting this licence granted. If it were otherwise, if it really could be said that he was anxious to get this through in order to enhance the prospects of his election, I should, of course, agree that he was thereby disqualified. On the authority of *Reg.* v. *Hertfordshire Justices*,[13] I should also be disposed to think that the result would be that the whole bench was tainted with disqualification on that ground. But, on the whole, I do not think it would be right here to say that we should conclude that Alderman McVie had in truth any interest in re-election. In other words, I am not prepared to accept as an inference that we should draw that Alderman McVie's prospects of election would be likely to be enhanced by the granting of this licence. I think in this case we ought not to make any distinction as regards interest and possibility of bias between Alderman McVie and his colleagues on the bench. The result, therefore, is, in my judgment, that the decision of the majority in the Divisional Court is well-founded and should be affirmed.

I repeat, that the problem which faces the bench of licensing justices in Barnsley is not thereby very much assisted, as Mr. Humphreys pointed out and as was plainly stated by the majority of the Divisional Court. All these justices are disqualified and though the acts done in the past by them, if my view is the right view, should be treated as valid, that result, of course, does not suffice to validate for the future anything which they may think they can do or propose to do. However, that is a problem for solution in Barnsley and not in this court.

For the reasons which I have tried to state, I would dismiss the appeal.

ORMEROD L.J. I agree that the appeal should be dismissed. Mr. Humphreys, in the first part of his argument dealing with the legal question, put in the forefront a passage from the judgment of Blackburn J. in *Reg.* v. *Rand*,[14] where he said: "There is no doubt that any direct pecuniary interest, however "small, in the subject of inquiry, does disqualify a person from "acting as judge in the matter." Mr. Humphrey's submission was that the principle had therefore been established as long ago as 1866 and had received the approval of this court in *Rex* v. *Sunderland Justices* [15] in 1901, and there was no ground for saying that it had been modified by any of the statutory enactments to which we have been referred. I agree with the view expressed by the Master of the Rolls that that submission is not well-founded.

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[13] (1845) 6 Q.B. 753.

[14] L.R. 1 Q.B. 230, 232.

Section 48 of the Licensing Act, 1953, is a section which deals with the disqualification of justices who have a financial interest in one way or another in the brewing, distilling or sale of intoxicating liquor. The particular section with which this appeal is concerned, section 48 (4), provides that, if any justice shall act for any purpose under the Act in a case concerning any premises, in the profits of which he is interested, he is disqualified. It appears that, so far as that subsection goes, the principle established there is in accordance with the principle established in *Reg.* v. *Rand.*[16] But the section does not finish there because we have to take into account subsection (5) which provides: "No "act done by any justice disqualified by this section shall be "invalid by reason only of that disqualification. . . ." The disqualification of the justice remains, but the act shall not be invalidated by reason of the fact that the cause of the disqualification arises because the justice had an interest in the profits of the premises in question and so in consequence was disqualified.

The position, therefore, appears to be that, if the justices were disqualified only because of the interest they had in the profits of the premises, then the act, which they performed under the Licensing Act, is not invalidated. It may very well be that so far as the particular circumstances envisaged by subsections (4) and (5) of section 48 of the Act of 1953 are concerned, the principle laid down in *Reg.* v. *Rand* [16] has been modified. But, in my judgment, that is the plain meaning of the words of the section. Of course, if the justices had some direct pecuniary interest in the premises, other than an interest in the profits of the premises, then the principle in *Reg.* v. *Rand* [16] would still apply and the act would be invalidated in spite of the provisions of section 48 (5) of the Act of 1953.

Therefore, the sole question on this part of the case is whether the interest which these justices undoubtedly had in the premises was an interest in the profits of the premises and nothing more.

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[15] [1901] 2 K.B. 357; 17 T.L.R. 551, C.A.

[16] L.R. 1 Q.B. 230.

They were all members of the co-operative society. They received periodically what are called dividends, that is to say, payments which were in fact a share of the profits of the trade of the society in proportion to the amount of the purchases made by them. I think the term "in the profits of which he is interested" is an elliptical expression and means the profits of any business carried on in the premises. In my judgment, the answer to the question whether the justices were interested in the profits of the premises must unquestionably be answered in the affirmative.

The question arises whether the justices had any further financial or other interest in the premises other than an interest in the profits. It was suggested in the course of the argument that they had such further interest in that they were in reality able to buy their bottles of spirits at a reduced rate of something like 2s. 6d. or 2s. 7d. per bottle. The Master of the Rolls has dealt fully with that matter, and I do not propose to say anything more than that I agree with the view which he has expressed. It appears to me that all that in fact happens is that what the members pay for a bottle of spirits becomes part of the purchase money paid by a member in respect of which, in due course, he will receive dividends and the dividends will be enhanced certainly by the price paid for that bottle of whisky but no more than by the price he has paid for the groceries and any other commodities which he has purchased from the society. In those circumstances, it appears to me that the fact that he must in due course receive dividends, some portion of which will be related to the purchase price he has paid for a bottle of wine or a bottle of spirits, according to the amount he requires, cannot bear any wider meaning than that he is interested in the profits of the premises. Therefore, if those are the whole of the circumstances of the case, it would appear to me that the act of the justices is fully protected by section 48 (5).

Mr. Humphreys has argued, however, that even if subsection (5) applies in this case and the principle of *Reg.* v. *Rand* [16] should not be applied to the interest in the profits of the premises, there is still evidence of a likelihood of bias which should be taken into account and should be sufficient to invalidate the act of the justices in this case. Apart from the question of the purchase of spirits at a reduced price, he really relied on two points: First, the position of Alderman McVie who was the chairman of the justices. There is no evidence before the court

[16] L.R. 1 Q.B. 230.

that Alderman McVie intended at any future time to offer himself again for election as a director, and there is no evidence of any kind—and, indeed, it is disclaimed by the applicants—that he had this matter in mind or would be likely to allow it to affect his mind in coming to the decision in this case. I am satisfied that Alderman McVie should not be treated here in any way differently from the other justices engaged in the case.

Mr. Humphreys went further and said that there was here evidence of a real likelihood of bias because of the powerful social and political influence of the co-operative society in a town of the size of Barnsley which is a town of some 75,000 inhabitants. Again, there was no evidence before the court that the co-operative society was a society with any powerful social and political influence. The evidence was that it was a large co-operative trading society of which a very high proportion of the inhabitants of Barnsley were members. But there was nothing, so far as I can see, to justify the submission that the very existence and influence of the co-operative society was such that to be a member must be an indication of bias if a question of this kind came before the licensing bench.

In the circumstances, in my view, the decision which was come to by the majority of the Divisional Court was a proper one, and I also would dismiss this appeal.

Devlin L.J. I am of the same opinion as my brethren, though I have felt in the course of the argument more difficulty than they have done.

In the first place, I do not think that the point of law, the construction of the statute, which Mr. Humphreys put in the forefront of his argument, is beyond doubt. If the matter were res integra, I think there is much to be said for the construction of the section which found favour with Salmon J. But this section has been considered before in *Rex* v. *Tempest*,[17] to which the Master of the Rolls has referred. It is quite true that in that case the underlying rule, the rule in *Reg.* v. *Rand*,[18] was not involved, as there was no direct pecuniary interest in the case of the justices there involved. But the court did consider the construction of subsection (5) and they arrived at a construction which was the one adopted by the majority of the Divisional Court here and which is fatal to the contention of Mr. Humphreys on this point. We are not bound by *Rex* v.

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[17] 86 L.T. 585.

[18] L.R. 1 Q.B. 230.

Tempest,[19] but, in order to decide in favour of Mr. Humphreys on this point, we should have to overrule the reasoning in it and that is something which, in the circumstances, I should be very reluctant to do. Where there are different possible constructions and where one of them has been given to this section—I say this section because it was given to its lineal predecessor, which is the same thing—since 1902, there is a great deal in the principle of stare decisis so that people who may have to administer the Act will know where they are. For this reason, therefore, I have not felt it necessary or desirable to pursue any further the doubts which are in my mind, as I should have been in duty bound to do if there had been no authority from which I could seek guidance. I think we should apply the construction which was approved in *Rex* v. *Tempest*.[19]

From that it follows that if the interest of the justices in the present case falls within the description in subsection (4), then by virtue of subsection (5) any act done by them shall not be invalidated. I cannot say I find subsection (4) an easy one to construe. Indeed, one of the reasons which might have led me to prefer the view adopted by Salmon J. is the rather arbitrary situation which is created on the opposite view. I think the right construction of it is that which has been adopted by the majority of the Divisional Court, and which has found favour with my brethren here, that the words "in premises in the profits of which "he is interested" refer to the profits of any trade carried on on the premises. I reach that conclusion, not for the positive reason that that is the meaning which the language clearly conveys to me, but for the negative and less satisfactory reason that I can find no other intelligible meaning to put upon the words. On this view, a rather arbitrary situation may arise if a man is pecuniarily interested in the result of the application but not interested in the profits of the premises. In that case the underlying rule in *Reg.* v. *Rand*[20] applies, whereas if his interest is of a character which comes within the subsection, then it will not apply. I cannot regard that as a satisfactory distinction, but I think it inevitably follows from the construction which we have put upon the section.

It is not merely an academic point and I do not mention it merely because of its possible consequences in the future. It has in fact arisen in the present case. There can be no doubt (and Mr. Humphreys has not contended otherwise) that the interest which members of the co-operative society receive by way of fixed percentage on their shares is an interest in the profits of the premises. But he has argued—and the argument commended itself to Salmon J.—that that part of the dividend which is paid not by reference to the amount of the shareholding but by reference to the amount which is bought—1s. 6d. or whatever it may be in the £ off the amount of the purchases of the member—is a discount and not an interest in the profits. I agree that prima facie a discount is not an interest in the profits. I should also agree that, although this is described as a dividend, if one looks at the substance of the matter, it is a discount off the price. It might just as easily have been done in that form. Whether one should look at the substance of the matter or whether one should be governed by its form, I find it unnecessary to determine, because if this be properly described as a discount, it is a discount which is dependent on the profits. It is a peculiar discount dependent upon profits, and, therefore, is an interest in profits, which comes within subsection (4).

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[19] 86 L.T. 585.

[20] L.R. 1 Q.B. 230.

Accepting the decision in *Rex* v. *Tempest*,[21] Mr. Humphreys must satisfy the court that there was a real likelihood of bias. I regard this as a borderline case on that point. We must have regard to the position of Alderman McVie. Here may I say, because I have mentioned the name expressly, that I agree, as the Master of the Rolls has already said, that there is no suggestion of actual bias against anyone in this case. But Alderman McVie's position was slightly different from that of the others. I do not derive more from the facts which are before us than that he was a man who wished to be actively concerned in the management of the affairs of the society and he was not, therefore, in quite the same position as a passive shareholder; and he was in the chair.

I agree with what the Master of the Rolls has said about the effect of the decision in *Rex* v. *Hertfordshire Justices*.[22] I do not think in this sort of case that if one or more members of the bench were found to have a real likelihood of bias, it would be right or proper to count heads and say there was a majority of unbiased members. One cannot tell, as the judgment in that case points out, to what extent the bias of even one magistrate, especially if he be the chairman, may influence the decision of the rest. One has to look at the whole picture. Here is an application by the co-operative society and there is sitting to decide it a bench which is wholly composed of members of the society and one woman whose husband was a member of the society, presided over by a chairman who had interested himself actively in the conduct of the affairs of the society or was desirous of doing so. Is there, in those circumstances, a real likelihood of bias? I am not quite sure what test Salmon J. applied. If he applied the test based on the principle that justice must not only be done but manifestly be seen to be done, I think he came to the right conclusion on that test. I cannot imagine anything more unsatisfactory from the public point of view than applications of this sort being dealt with by a bench which was so composed, and, indeed, it is conceded that steps will have to be taken to rectify the position. But, in my judgment, it is not the test. We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias—not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad. The term "real likelihood of bias" is not used, in my opinion, to import the principle in *Rex* v. *Sussex Justices* [23] to which Salmon J. referred. It is used to show that it is not necessary that actual bias should be proved. It is unnecessary, and, indeed, might be most undesirable, to investigate the state of mind of each individual justice. "Real likelihood" depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood, without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit. Although, as I say, I think this is a borderline case which comes very near the mark, I have reached the same

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[21] 86 L.T. 585.

[22] 6 Q.B. 753.

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[23] [1924] 1 K.B. 256; sub nom. *R.* v. *Hurst, Ex parte McCarthy*, 40 T.L.R. 80, D.C.

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conclusion upon it as that which my brethren have already expressed.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *J. E. Lickfold & Sons for J. Donald Driver, Barnsley; Batchelor, Fry, Coulson & Burder for W. Winter, Barnsley.*

B. A. B.

1960
June 16, 21.

Lord Parker C.J., Hilbery, Cassels, Donovan and Davies JJ.

REGINA *v.* DUFFY AND OTHERS. *Ex parte* NASH.

Contempt of Court—Pending proceedings—Court of Criminal Appeal—Newspaper article referring to character of appellant—No real risk of article affecting impartiality of judges—Whether calculated to prejudice fair hearing of appeal against sentence.

The day after the applicant was convicted of causing grievous bodily harm with intent, for which he was sentenced to five years' imprisonment, an article appeared in a national newspaper which he alleged contained untrue statements about him and made him appear to be a man addicted to violence. The applicant intended to and subsequently did appeal to the Court of Criminal Appeal against both conviction and sentence. On an application for writs of attachment for contempt of court against the writers of the article and the editor and proprietors of the newspaper on the ground that the article was or might be prejudicial to him on the hearing of his appeal:—

Held, that the court would only issue a writ of attachment if, in all the circumstances existing at the date of publication of the matter complained of, including its content and form, the circulation of the paper in which it appeared, and the state of the proceedings, it was intended or calculated to prejudice the fair hearing of the proceedings, and that the article, although published at a time when publication of improper matter might constitute contempt of court, was not calculated to interfere with the hearing of an appeal should one be brought, for if a judge who might be a member of the Court of Criminal Appeal on the appeal had read it and remembered its contents, he would not be influenced by it consciously or unconsciously when considering whether the conviction was right in law or the sentence correct in principle. By his training a judge had no difficulty in putting out of his mind matters which were not evidence in the case, and the test was whether he would be so influenced by the article that, consciously or even unconsciously, his impartiality would be affected, that was, whether there was a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing, and, accordingly, there being no such risk, the article did not constitute a contempt of court.

Reg. v. *Payne* [1896] 1 Q.B. 577; 12 T.L.R. 321, D.C. and *Rex* v. *Parke* [1903] 2 K.B. 432; 19 T.L.R. 627, D.C. applied.

Dicta of Humphreys and Oliver JJ. in *Rex* v. *Davies, Ex parte Delbert-Evans* [1945] K.B. 435, 442, 443, 446; 61 T.L.R. 428; [1945] 2 All E.R. 167, D.C. questioned.

Quaere, whether publication of improper matter after the determination of an appeal by the Court of Criminal Appeal might not constitute contempt, since the proceedings might, on the grant of the Attorney-General's fiat, go to the House of Lords.

Quaere, also, whether the possibility of an award of a venire de novo could be a relevant consideration.

MOTIONS for writs of attachment.

On May 9, 1960, at the Central Criminal Court, the applicant, James Lawrence Nash, was found guilty of causing grievous bodily harm with intent and sentenced to five years' imprisonment. According to an affidavit filed in support of the motions, immediately after the trial members of the Press and representatives of the Press Association were informed that an appeal would be lodged against both conviction and sentence. On the following day, May 10, there appeared in the issue of the "Daily "Sketch" an article which, it was alleged on behalf of the applicant, contained untrue statements relating to him and made him appear to be a man addicted to violence. The applicant did in fact apply for leave to appeal against both conviction and sentence, and his application was received by the court on May 18.

The applicant sought writs of attachment against Peter Duffy, John Kirk and Joseph Gillin as the writers of the article, Colin Gordon Valdar as the editor, and the Daily Sketch and Daily Graphic Ltd., the proprietors of the "Daily Sketch," on the ground that the article was or might be prejudicial to him on the hearing of his appeal in the Court of Criminal Appeal. The application for leave to move was made on his behalf on May 11, 1960.*

The facts are more fully stated in the judgment of the court.

J. Elson Rees and *Montague Sherborne* for the applicant. Criminal proceedings remain sub judice until the time in which

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* The court, in giving the applicant leave to move, intimated that the Attorney-General should be approached with a view to his taking over the proceedings. For the views of the Attorney-General on this matter, see post, p. 192.

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notice of appeal may be given had expired, or, if notice is given, until the appeal has been determined: *Rex* v. *Davies, Ex parte Delbert-Evans*.[1] Normally, although not invariably, applications such as these are not heard until after the original proceedings have ceased to be sub judice: see the remarks of Lord Goddard C.J. in *Reg.* v. *Hargreaves, Ex parte Dill*.[2] The applicant does not, however, ask that this hearing be stood over, since it is a matter of public concern and the time when it is heard is entirely a question for the court; but, in view of the notoriety which this case has already attracted, some doubt is felt whether the article should now be read in open court as it would be undesirable to give further publicity to its contents.

[Lord Parker C.J. We think that those parts of the article of which complaint is made should be read.]

[Extracts from the article, set out in the judgment of the court (post, p. 195), were accordingly read.]

Elson Rees for the applicant. The article makes the applicant appear to be a man of violence, whereas, in fact, that is not his character, and, therefore, it is plainly prejudicial to him in his appeal. Reliance is placed on *Rex* v. *Davies, Ex parte Delbert-Evans*,[3] where Humphreys and Oliver JJ.[4] considered that the minds not only of jurors but also of judges could be affected by prejudicial matter. In that case the appeal was against conviction only; here there is also an appeal against sentence and this is a stronger case. Humphreys and Oliver JJ. in the *Davies* case [4] both thought that publication of such matter was "embarrassing" to the members of the Court of Criminal Appeal, and the inference is that, had there been an appeal against sentence in that case, they would have held the publication to be contempt of court. In this case, particularly in regard to the appeal against sentence, nothing could be more prejudicial to the applicant, nor embarrassing to the court, than the contents of this article.

[Lord Parker C.J. Judges are not superhuman, but do you have to be a superman to put articles such as this out of your mind?]

There can be no doubt that Humphreys and Oliver JJ. would have had no difficulty in putting the article in the *Davies* case [5] out of their minds, but nevertheless they both considered that it should not have been published because it tended to be prejudicial and to embarrass the judges.

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[1] [1945] K.B. 435; 61 T.L.R. 428 (sub nom. *Delbert-Evans* v. *Davies*) [1945] 2 All E.R. 167 (sub nom. *Delbert-Evans* v. *Davies and Watson*).

[2] (1953) The Times, Nov. 4.

[3] [1945] K.B. 435.

[4] Ibid. 442, 443, 445.

[5] Ibid. 435.

[HILBERY J. But how could any member of the Court of Criminal Appeal possibly be affected by this?]

No member of the court would consciously be affected by it. It is not suggested that the members of the court would not put the contents of this article out of their minds, but it might affect them unconsciously: a matter may be put out of the mind, but the memory, or the unconscious memory, remains. It is difficult to lay down any test as to the subconscious effect of information. Although it cannot be argued that the article would affect the minds of the members of the court in considering points of law in the appeal against conviction, it is possible that it could affect their minds in considering the appeal against sentence. Sentence is not automatic; one of the matters to be considered is whether a particular sentence is a deterrent so far as the particular individual is concerned. Reputation, therefore, is relevant, and it cannot be gleaned entirely from the evidence. This article is or could be calculated to prejudice the fair hearing of the appeal against sentence within the test put forward by Lord Russell of Killowen C.J. and Wright J. in *Reg.* v. *Payne*.[6]

[LORD PARKER C.J. Whether or not it is relevant to this motion, there can be no doubt that the applicant having seen the article will feel that he can have no hope in his appeal.]

It is submitted that that is relevant. It is prejudicial that the applicant should think that he will not have the fair hearing to which he is entitled. The question is not whether the article would in fact affect the mind of any individual member of the court; it is enough if it could, and if members of the public, however high the respect they may have for the judges of this country, would think that it might prejudice the hearing of the appeal. The statement of the law in Halsbury's Laws of England, 3rd ed. (1954), vol. 8, p. 9, which is the same as that (2nd ed., vol. 7, p. 2) approved by Humphreys J. in the *Davies* case [7] is adopted as part of the argument for the appellant. To hold that matter such as this is not capable of amounting to contempt of court would mean that judges are such that publication of this type of article could never affect them in carrying out their duties, and that would be going too far.

This article would affect the minds of a jury, and the question

[6] [1896] 1 Q.B. 577, 580, 581, 582; 12 T.L.R. 321.

[7] [1945] K.B. 435, 443.

is at what stage matter published in a popular newspaper ceases to be prejudicial. The court should not be required to ascertain what newspapers are or are not read by its members, but the article must be considered as one published in a national newspaper with a wide circulation. Even if members of the court are not likely to read this particular newspaper, it is one which might well come into their households, and be seen by, or be spoken of to, them. Furthermore, the possibility of an award of a venire de novo cannot be excluded. Proceedings are pending until finally brought to an end, but the hearing by the Court of Criminal Appeal may not necessarily bring them to an end. [Reference was also made to the judgment of Humphreys J. in *Rex* v. *Davies, Ex parte Delbert-Evans*.[8]] In the event of a retrial this article would be highly prejudicial.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* as amici curiae. The application is not supported. The usual practice in recent years has been for persons complaining of a publication to make an informal approach to the Attorney-General and, if it appears desirable in the public interest that a case should be brought before this court, an application is made by the Attorney-General for leave to move. Proceedings have never been taken over by the Attorney-General after leave to move has already been given to the applicant himself, and it would seem that, under R.S.C., Ord. 59, rr. 3 (1) and 26, they could not be taken over at that stage. Had it been possible, it would not have been desired to take over these proceedings.

The proposition in *Rex* v. *Davies, Ex parte Delbert-Evans* [8] that matter published after the conclusion of the trial before a jury may constitute contempt of court is not challenged. The stage at which criminal proceedings cease to be sub judice does not fall for determination in this case, but it might be that Humphreys J.[9] did not go far enough, and that the proceedings are not finally determined until after the expiry of time in which to apply for a fiat, or, if a fiat be granted, until after the hearing in the House of Lords. It is possible to envisage circumstances in which matter published could be calculated to prejudice proceedings before an appellate tribunal and could amount to contempt of court, for example, circumstances such as those in

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[8] [1945] K.B. 435, 438.

[9] Ibid. 444.

Reg. v. *Gunn, Ex parte Attorney-General*,[10] where the publication was part of a deliberate campaign to influence the tribunal. In such a case the test would be: Is the publication calculated really to interfere with a fair hearing: see *Reg.* v. *Payne*,[11] *per* Wright J.,[12] and *Reg.* v. *Odhams Press Ltd., Ex parte Attorney-General*,[13] *per* Lord Goddard C.J.[14] In considering that question, regard must be had not only to the contents of the publication but to all the circumstances, including the nature of the newspaper in which it was published, the stage of the proceedings and the tribunal before which they are pending. This article, which, broadly speaking, paints the applicant as a small-time hooligan with big ideas, cannot be said to be calculated really to interfere with the fair hearing of an appeal, whether against conviction or against sentence. Even if it had been published immediately before the hearing of the appeal, it is inconceivable that any member of the Court of Criminal Appeal could have been affected, either consciously or unconsciously, by any of the statements in it, when he had before him the sworn evidence as to character given at the trial.

As to the possibility of an award of a venire de novo, at the time of publication a further trial before a jury was not pending and its possibility is too remote. A venire de novo was not relevant to the grounds of the decision of Humphreys J. in the *Davies* case.[15] The test at this stage of the proceedings is not whether the publication is likely to affect the minds of a jury, but whether it is likely to impair or affect the discharge of his official duties by a member of the Court of Criminal Appeal. Mere embarrassment of a judge is not enough; it is not likely to affect him in the discharge of his duties. Matter which is "embarrassing" to a judge, or something which he would rather not hear, or which makes it more difficult for him to discharge his duties, is not calculated to interfere with a fair hearing and is not contempt. In so far as the decision in *Davies* case[16] was based on embarrassment and a venire de novo, it is submitted that it is wrong.

Even if this article did contain matters calculated to interfere with the fair hearing of the appeal, this would not be a case in which the court should exercise its discretion to issue the writs.

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[10] (1953), The Times, Nov. 14.

[11] [1896] 1 Q.B. 577.

[12] Ibid. 581.

[13] [1957] 1 Q.B. 73; [1956] 3 W.L.R. 796; [1956] 3 All E.R. 494.

[14] Ibid. 80.

[15] [1945] K.B. 435.

[16] Ibid.

Whether or not the applicant is aggrieved by the article is irrelevant: if he is, his remedy lies elsewhere. The court is asked to dismiss this application.

Neville Faulks Q.C. and *David Hirst*, for the respondents, were not called upon.

Elson Rees, in reply, referred to *Reg.* v. *Odhams Press Ltd., Ex parte Attorney-General.*[17] The test is not subjective. It is an objective test, that is, whether the man in the street would feel that a publication could prejudice the fair hearing of proceedings. If that is not the right test, it would be necessary to consider the composition of the bench hearing the appeal to see whether any of its members were in fact influenced by the article. In this case the applicant and the man in the street might well feel, however wrongly, that as a result of the article he would be unlikely to have a fair hearing.

Lord Parker C.J. The court dismisses this application for reasons which will be put into writing and delivered at a later date.

June 21. Lord Parker C.J. read the following judgment of the court: In these proceedings Mr. Elson Rees moves on behalf of the applicant, James Lawrence Nash, for writs of attachment against Peter Duffy, John Kirk, Joseph Gillin, Colin Gordon Valdar and the Daily Sketch and Daily Graphic Ltd. on the grounds that an article which appeared in the issue of the "Daily "Sketch" of May 10, 1960, constituted a contempt of court. The first three defendants are stated to be the authors of the article in question, the fourth defendant is the editor of the "Daily Sketch," and the fifth defendants are the owners and publishers of the paper.

The applicant, together with two other men, was tried at the Central Criminal Court in May on a charge of causing grievous bodily harm with intent to one Selwyn Keith Cooney. The trial, which attracted considerable publicity, concluded on May 9, when the applicant was found guilty and sentenced to five years' imprisonment. Apart from two previous convictions, namely, that in November, 1949, when he was 17 years of age, he was put on probation for stealing cash from an automatic machine, and that in March, 1951, he was fined £3 for stealing poultry from a hen house, he bore a good character. His military record as given at the trial was: "Military conduct very good. Since this man

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[17] [1957] 1 Q.B. 73.

"has been in the Army he has shown continued improvement "and I have a high opinion of him. He is smart, hard working "and well disciplined. Is a boxer of some merit, a good sports-"man and physically keeps himself very fit. Had he elected to "serve on I should have considered him for N.C.O. rank."

In addition, his employers certified that he had been continuously in their employment from May 17, 1954, until his arrest in February, 1960, and that they found him to be "reliable, "industrious and honest, popular with his workmates, and was "of a quiet and peaceable disposition."

The next day, May 10, 1960, there appeared the article in question. It is unnecessary to read it in full, but it stated, inter alia, as follows: "A C.I.D. officer pointed a finger in an East "End pub and said: 'That man will end up in the dock on a "'charge of violence.'" "That was a year ago and the finger "pointed to a vicious-looking man who was sipping a grape-"fruit and was surrounded by admiring young tear-aways and "adoring street-girls." "Jimmy Nash was his name—the 28-"year-old muscle-man jailed for five years yesterday for causing "grievous bodily harm to Soho Club manager Selwyn Keith "Cooney." "It was a woman—and a personal challenge to pride "and passion—that led Nash to the dock at the Old Bailey." "Honour, however, played little part in the life of James Nash, "a small-time hooligan with big ideas." "But, somehow, "somewhere, James Nash picked up a strange idea: he believed "that 'No one, not even the police, can touch me.'" "This, "then, is the villain of the piece. A man who, until he stepped "into the Pen Club just after midnight on February 6, was just "an obscure thug."

Logically, the first question is whether on May 10, when the article was published, the proceedings against the applicant were still sub judice or pending, so that the publication of improper matter might amount to a contempt of court. As to this, it is clear on the authorities that proceedings are pending in this sense from the time that a person is charged, even though he has not been committed for trial: cf. *Rex* v. *Parke*.[1] When proceedings cease to be pending is not clear in the authorities, though in *Rex* v. *Davies, Ex parte Delbert-Evans*[2] Humphreys J. said[3]: "I

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[1] [1903] 2 K.B. 432; 19 T.L.R. 627, D.C.

[2] [1945] K.B. 435; 61 T.L.R. 428 (sub nom. *Delbert-Evans* v. *Davies*); [1945] 2 All E.R. 167, D.C. (sub nom. *Delbert-Evans* v. *Davies and Watson*).

[3] [1945] K.B. 435, 444, 445.

"think a criminal case may be said to be finally over when the "Court of Criminal Appeal has heard and determined the appeal, "if any. After that time they are in no peril of being dealt with "for contempt of court."

It may well be, however, that that is too restricted a view, for it could be said that the publication of improper matter thereafter might constitute contempt since the proceedings might on the grant of the Attorney-General's fiat go to the House of Lords. That, however, remains for decision in some other case. *Rex* v. *Davies*,[4] however, is clearly authority for the proposition that a criminal case remains sub judice at any rate until the time has expired within which notice of appeal to the Court of Criminal Appeal may be given, or, in the event of such notice being given, until the appeal has been heard and determined. In the present case the article was published the day after the trial and, in fact, an application for leave to appeal against both conviction and sentence was received by the court on May 18.

The next question is as to what matter constitutes a contempt of court, and in what circumstances the court will issue a writ of attachment. In *Rex* v. *Parke* [5] Wills J., who delivered the judgment of the court, consisting of Lord Alverstone C.J., Channell J. and himself, said [6]: "The reason why the publication of articles "like those with which we have to deal is treated as a contempt "of court is because their tendency and sometimes their object "is to deprive the court of the power of doing that which is the "end for which it exists—namely, to administer justice duly, "impartially, and with reference solely to the facts judicially "brought before it. Their tendency is to reduce the court which "has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned."

At the same time it has been emphasised in a number of cases that it is only in clear cases that the writ will issue. Thus, in *Reg*. v. *Payne*,[7] Lord Russell of Killowen C.J. said [8]: "I wish "to express the view which I entertain, that applications of this "nature have in many cases gone too far. No doubt the power "which the court possesses in such cases is a salutary power, "and it ought to be exercised in cases where there is real contempt, but only where there are serious grounds for its exercise. "Every libel on a person about to be tried is not necessarily a

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[4] [1945] K.B. 435.
[5] [1903] 2 K.B. 432.
[6] Ibid. 436, 437.
[7] [1896] 1 Q.B. 577; 12 T.L.R. 321.
[8] [1896] 1 Q.B. 577, 580.

"contempt of court; but the applicant must show that something "has been published which either is clearly intended, or at least "is calculated, to prejudice a trial which is pending."

In the same case, Wright J., in agreeing with Lord Russell of Killowen C.J., said[9]: "I agree with all that the Lord Chief "Justice has said, and I only wish to add that, in my opinion, "in order to justify an application to the court the publication "complained of must be calculated really to interfere with a fair "trial, and, if this is not the case, the question does not arise "whether the publication is so objectionable in its terms as to "call for the interference of the court. If the publication is found "to be likely to interfere with a fair trial, a second question "arises, whether, under the circumstances of the case, the "jurisdiction which the court in that case possesses ought to be "exercised, not so much for punishment as for preventing similar "conduct in the future. That is the rule which I wish to adopt "with regard to applications of this nature."

Words to much the same effect were used by Lord Goddard C.J. in *Reg.* v. *Odhams Press Ltd.*,[10] where he said: "The test "is whether the matter complained of is calculated to interfere "with the course of justice."

Accordingly, the question in every case is whether, in all the circumstances existing at the date of publication, including the content and form of the article, the circulation of the paper in which it appears, and the state of the proceedings, the article was intended or calculated to prejudice the fair hearing of the proceedings. In the present case the article in question was published at a time when the trial before a jury was completed, but when the time in which to apply for leave to appeal against conviction and sentence had not elapsed. It was, therefore, published at a time when the proceedings were pending in the sense used by the authorities, and it is clear that improper matter published at that time might constitute a contempt of court. This might well occur if, for instance, the article in question formed part of a deliberate campaign to influence the decision of the appellate tribunal. In the present case there is no suggestion of any such intention, and the sole question is whether the article when published on May 10 was in all the circumstances calculated to interfere or calculated really to interfere with the hearing of the appeal, should one be brought. Looking at it in that way, and in the absence of authority, we should have thought that the answer was plainly: "No." Even if a judge who eventually sat on the appeal had seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it. A judge is in a very different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This, indeed, happens daily to judges on assize. This is all the more so in the case of a member of the Court of Criminal Appeal, who, in regard to an appeal against conviction is dealing almost entirely with points of law, and who, in the case of an appeal against sentence, is considering whether or not the sentence is correct in principle.

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[9] [1896] 1 Q.B. 577, 581.

[10] [1957] 1 Q.B. 73, 80; [1956] 3 W.L.R. 796; [1956] 3 All E.R. 494, D.C.

Great reliance has, however, been placed by the applicant on certain passages in the decision of this court in *Rex* v. *Davies*.[11] Thus, in considering whether proceedings were pending when the time for appeal had not elapsed, Humphreys J. referred to the fact that the Court of Criminal Appeal had power in certain circumstances to award a venire de novo, and he added [12]: "It "follows that any matter which is published between the date of "a conviction and the date of the hearing by the Court of "Criminal Appeal may come to the attention of a juryman who "has to try the question of the guilt or innocence of some person "on the indictment in respect of which venire de novo has been "awarded."

Whether this is a relevant consideration is open to doubt, since it may be that the proper test is whether the article is calculated to interfere with the hearing of the pending proceedings, that is, proceedings in the Court of Criminal Appeal rather than some fresh proceedings resulting from an award of venire de novo. Be that as it may, nothing had occurred on May 10 which would suggest that there had been any mis-trial such as would justify the court in awarding a venire de novo. Such an award is only made in very rare circumstances, and where it can be said that there has been a mis-trial from the beginning. In fact, though of course this is not conclusive, there is no suggestion in the grounds of appeal that have been submitted that any mis-trial took place. Further, it is not without interest to observe that in *Rex* v. *Davies* [13] the article in question, though more likely to be prejudicial than the article in the present case, was not held to be a contempt of court on the ground that a venire de novo might conceivably be awarded. It is true that in that case, as Humphreys J. emphasised, the appeal had been heard and dismissed, but the test is not whether harm has resulted but whether at the date of publication the article in question was calculated to prejudice the fair hearing of the proceedings.

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[11] [1945] K.B. 435.

[12] Ibid. 442.

[13] [1945] K.B. 435.

Humphreys J. further, however, considered the matter from the point of view of a judge who might sit in the Court of Criminal Appeal on the hearing of any appeal. He said[14]: "He "is a human being, and while I do not suggest that it is likely "that any judge, as the result of information which had been "improperly conveyed to him, would give a decision which other-"wise he would not have given, it is embarrassing to a judge "that he should be informed of matters which he would much "rather not hear and which make it much more difficult for him "to do his duty."

Again he said[15]: "It seems to me that the bringing before "the minds of judges who have to try an appeal in a criminal "case matters which they do not desire to know, and which if "brought to their attention are likely to embarrass them in the "fair and impartial consideration of the case, is wrong. Whether "that view is right or not, I cannot say. It is my own opinion "and I express it as such, but I venture to think that no judge "with long criminal experience will fail to be able to recall "instances in which the publication of matters such as that to "which I have referred has had the effect of making the task of a "judge extremely difficult, and no one has the right to publish "matter which will have that effect."

Again, Oliver J. said[16]: "I fully agree with my Lord, and I "share his view as to the importance of the matter, that jurors "are not the only people whose minds can be affected by "prejudice. One of the evils of inadmissible matter being "disseminated is that no one can tell what effect a particular "piece of information may have on his mind. Why, as my Lord "has asked, and I can think of no better word, should a judge "be 'embarrassed' by having matters put into his mind, the "effect of which it is impossible to estimate or assess?"

Both of the judges, moreover, in refusing the writ, emphasised that the appeal in that case was against conviction only, whereas the matters published were only relevant on sentence. The inference, accordingly, was that if, in that case, the appeal had been against sentence the article might well have constituted a contempt of court.

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[14] [1945] K.B. 435, 442.

[15] Ibid. 443.

[16] Ibid. 445.

It is by no means clear what the judges in that case intended to convey by the word "embarrassed." If, in its context, the word means no more than this, namely, that the article had put upon the judge, quite unnecessarily, the task of dismissing the offending matter from his mind, then we think the dicta we have quoted go too far. Embarrassment which has no effect on impartiality is not necessarily contempt of court. The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing? In the present case we have come to the clear conclusion that there was obviously no such risk; and that, therefore, the article did not constitute a contempt of court.

We would only add this. We hope that nothing that we have said will lead newspapers to think that the court approves in any way of an article such as this. Not only do newspapers publish such articles at their peril in regard to proceedings for contempt of court or for libel, but the effect of such an article may well be that the prisoner will, however wrongly, think that he will be or has been prejudiced in his appeal. That, however, is not a relevant consideration for this court, which is only concerned with whether a contempt of court has been committed.

Application dismissed.
Respondents' application for costs refused.

Solicitors: *Sampson & Co.; Swepstone, Walsh & Co.; Treasury Solicitor.*

J. F. L.

FALLON *v.* CALVERT.

C. A.

[1955 F. No. 439.]

1959
Dec. 3, 18.

Hodson and Pearce L.JJ.

Evidence—Witness—Recall—Official Referee—Report by Official Referee ordered by judge—Evidence given at trial by defendant—Jurisdiction of Official Referee to recall defendant—R.S.C., Ord. 36A, *rr.* 2, 7, 9.

In an action for commission on the defendant's earnings, in which the defendant had given evidence, reference was made by a judge to the Official Referee under R.S.C., Ord. 36A, r. 2, to hear and report on the gross earnings of the defendant over a period of five years. The Official Referee directed that the defendant should attend before him to assist in making the report with the object that the defendant should be cross-examined. The defendant contended that the Official Referee had no jurisdiction to make the order:—

Held, that, although a judge has no power to call a witness without the consent of the parties, the defendant, having already given evidence could, at any time, be recalled by the judge; that proceedings before the Official Referee amounted to a continuation of the trial; that the right to recall was not personal to a particular judge but a right of the court; and that the Official Referee had, therefore, on the true construction of Order 36A, r. 7, jurisdiction to make the order.

In re Enoch and Zaretzky, Bock & Co.'s Arbitration [1910] 1 K.B. 327, C.A. distinguished.

APPEAL from the Official Referee.

On November 4, 1959, His Honour Percy Lamb Q.C., Official Referee, directed the defendant, Eddie Calvert, to attend before him to assist in making a report pursuant to an order of Paull J. dated April 23, 1959. The defendant appealed from that order on the ground that the Official Referee had no jurisdiction to make such an order.

The following statement of facts is taken substantially from the judgment: The plaintiff, Sebastian John Joseph Fallon (professionally known as Jack Fallon) was a manager and agent for theatrical artistes, and the defendant was a professional trumpeter. The claim of the plaintiff, in substance, was a claim for commission on the defendant's earnings due to him under a contract in writing. The defendant counterclaimed rectification of that agreement.

At the trial before Devlin J. evidence was given by the plaintiff, the defendant and others. Details of the defendant's earnings were not given, but the defendant admitted through his counsel

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that he had sworn a false answer to interrogatories, and that his books contained false entries.

On March 3, 1959, the judge made an interim order containing, inter alia, the following paragraph: "It is ordered that the "defendant do within seven days from the date hereof deliver to "the plaintiff a list of the gross earnings of the defendant as a "solo artiste or for himself and orchestra for a period of five "years commencing on November 1, 1951." No order for an account had so far been made, although a claim for an account was included in the statement of claim.

The defendant's purported compliance with this order of Devlin J. did not satisfy the plaintiff, and on April 23, 1959, Paull J. by consent made an order containing the following paragraph: "And it is ordered that this matter be referred to an "Official Referee to hear and report on the gross earnings of the "defendant as a solo artiste or for himself and orchestra for a "period of five years commencing on November 1, 1951."

On November 4, 1959, the Official Referee made the order directing the attendance of the defendant before him, which was the subject of the present appeal.

John G. Wilmers for the defendant. The order made by Devlin J. on March 3, 1959, was complied with on March 11, 1959; the case has been heard and all that remains to be done is for the damages to be fixed. The Official Referee had no power to order the defendant to attend as a witness and to be cross-examined. Since the case has been concluded, the defendant can only be recalled on a subpoena; without a subpoena there is no authority to order him back into the witness-box. The onus is on the plaintiff, and if he wants the defendant's evidence, he must subpoena him, but a defendant subpoenaed by the plaintiff becomes the plaintiff's witness and he cannot cross-examine him. The plaintiff's application for directions was under R.S.C., Ord. 36A, r. 5 (2); and rule 5 (5) applies Order 30, rr. 2 to 7, to proceedings before the Official Referee. Those rules do not confer power on the court to compel the presence of a party, and the Official Referee has no wider powers than a judge. There was no power to make this order, and defendant is not obliged to submit himself to a roving cross-examination.

In re Taylor [1] shows the difference between the taking of accounts in the Chancery Division and before an Official Referee, and that the Official Referee was not bound to adopt the strict manner adopted before a chief clerk in the Chancery Division.

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[1] (1890) 44 Ch.D. 128.

Frank Whitworth for the plaintiff. Even if the defendant had not been in the witness-box already, there would still have been power for the Official Referee to make this order (R.S.C., Ord. 37, r. 5). A judge can always make an order for the examination of a witness or call for additional evidence. Once a witness has been in the witness box the judge is not debarred from calling him back. If the court has power to issue a subpoena, it surely can issue an order in the nature of a subpoena. The defendant has submitted that there is no authority under which he can be recalled, but the court, under its inherent jurisdiction, can order the reappearance of any party who has already appeared before it—this power has been exercised from time immemorial, and has been preserved by section 18 of the Supreme Court of Judicature (Consolidation) Act, 1925. If Devlin J. had the power to recall the defendant, so had the Official Referee, who was concerned to carry out the judge's order.

If accounts had been ordered, and the defendant had sworn an affidavit, the plaintiff would clearly have been entitled to cross-examine him.

Wilmers in reply. The plaintiff had the defendant's evidence at the trial, and he has not made use of it; it would be a wrong use of the court's discretion in the circumstances to recall him. This is not on any view a bench warrant and, except in special cases, the court has no power of its own motion to call a witness in a civil case: *In re Enoch and Zaretzky, Bock & Co.'s Arbitration.*[2] In this country (as opposed to Continental countries) the court is not inquisitorial, and it hears cases on the evidence put before it by the parties. Special provisions are needed, for example, for examination of debtors and bankrupts. If the defendant does not give evidence—and it is in his discretion to decide whether he should—the court can presume the highest against him: *Armory* v. *Delamirie.*[3]

Apart from the question of the judge's power to order the defendant back into the witness-box, the proceedings before the Official Referee are a separate proceeding in a proceeding: R.S.C., Ord. 36A, r. 2. They are not, therefore, a continuation of the first proceeding. Order 36A, r. 9 (3), shows the distinction between what is done by an Official Referee and what is done by the judge.

Cur. adv. vult.

[2] [1910] 1 K.B. 327, C.A.

[3] (1722) 1 Stra. 505.

1959. Dec. 18. The judgment of the court was read by PEARCE L.J., in which he stated the facts and continued: On attending before the Official Referee the plaintiff was minded to secure the attendance of the defendant for cross-examination in order to establish, if he could, the extent of the earnings on which commission would be due, having in his possession (as we were told) certain contracts between the plaintiff and third parties which would or might assist to that end.

It is conceded by both counsel that the real object of the Official Referee in ordering the defendant to attend the hearing was to procure that he should enter the witness-box to answer the cross-examination of plaintiff's counsel. The plaintiff can, of course, ensure the defendant's attendance by a subpoena, but in that case his counsel would have to call and examine the defendant as his own witness.

In a civil suit the function of a court in this country (unlike that of courts in some other countries) is to decide cases on the evidence that the parties think fit to call before it. It is not inquisitorial. *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* [1] decided that a judge or umpire had no right to call a witness in a civil action without the consent of the parties. Fletcher Moulton L.J., in dealing with a previous case of *Coulson* v. *Disborough* [2] said [3]: "One of the learned judges, the Master of the Rolls, Lord "Esher, does, however, give utterance to a dictum which has been "relied on by counsel for the respondents. He says this [4]: 'If "'there be a person whom neither party to an action chooses to "'call as a witness, and the judge thinks that that person is able "'to elucidate the truth, the judge, in my opinion, is himself "'entitled to call him.' If that means to call him when either "side objects, I am satisfied that there is no basis for that "dictum; but it must be remembered that there is no suggestion "in the report or the judgments that the witness was called by "the judge against the will of either of the parties. It certainly "was not necessary for the decision; and the consequences to "which it would lead if so interpreted are such that I am satisfied "that the Court of Appeal would never have given in the form "of a mere dictum a decision so wide-reaching and so destructive "of the fundamental principles of our laws of procedure. It does "not purport to be based on any course of reasoning, and no "authority was cited for it."

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[1] [1910] 1 K.B. 327, C.A.

[2] [1894] 2 Q.B. 316; 10 T.L.R. 429, C.A.

[3] [1910] 1 K.B. 332.

[4] [1894] 2 Q.B. 318.

In *Rex* v. *Harris* [5] the Court of Criminal Appeal said [6]: "As to "the first point, it has been clearly laid down by the Court of "Appeal in *In re Enoch and Zaretzky, Bock & Co.*,[7] that in a civil "suit the judge has no right to call a witness not called by either "party, unless he does so with the consent of both of the parties. "It also appears to be clearly established that that rule does not "apply to a criminal trial where the liberty of a subject is at stake "and where the sole object of the proceedings is to make certain "that justice should be done as between the subject and the "State." We cannot find, therefore, that the court has any power of its own motion to order a defendant to attend the hearing of a civil suit for the purpose of calling him as a witness.

In the present case, however, the defendant has already given evidence, and the Official Referee is conducting what amounts to a continuation of the trial, which has not yet been concluded by a final judgment. In general, a judge has power to recall a witness who has given evidence, though he would not have had power to call him initially. In *Rex* v. *Seigley* [8] Hamilton J. said [9]: "A prisoner, when once he has made himself a witness, "is liable, like any other witness, to be recalled for the purpose "of answering such questions as the judge permits to be put to "him." Taylor on Evidence, 12th ed., para. 1477, states: "The "judge has always a discretionary power, with which the court "above is very unwilling to interfere, of *recalling witnesses* at "any stage of the trial, and putting such questions to them as "the exigencies of justice require." This passage was approved by the Court of Criminal Appeal in *Rex* v. *Sullivan*.[10] And the principle, so far as civil cases are concerned, has never been doubted. If a party chooses to give evidence, he submits himself to the court to be asked all such questions as justice requires until the case is concluded.

Under R.S.C., Ord. 36A, r. 2: ". . . the Court or a Judge may ". . . refer to an Official Referee for inquiry and report any "question or issue of fact arising therein; and, unless the Court "or a Judge otherwise orders, the further consideration of the "cause or matter shall stand adjourned until the receipt of the "Official Referee's report." That is the course that has been pursued here. In hearing the reference, the Official Referee has under Order 36A, r. 7 (1) (*a*): ". . . the same jurisdiction, powers and

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[5] [1927] 2 K.B. 587; 43 T.L.R. 774, C.C.A.

[6] [1927] 2 K.B. 594.

[7] [1910] 1 K.B. 327.

[8] (1911) 6 Cr.App.R. 106, C.C.A.

[9] Ibid. 107.

[10] [1923] 1 K.B. 47, C.C.A.

"duties (including the powers of attachment and committal and "discretion as to costs) as a judge, exercisable or, as the case may "be, to be performed as nearly as circumstances admit in the like "cases, in the like manner and subject to the like limitations. . . ." Had the judge continued the trial himself instead of adjourning to the Official Referee the "question or issue of fact" on the accounts, he could have recalled the defendant in order that he might be asked questions about them. On the face of it, under the words of rule 7 (1) (*a*), the judge's power to recall could be exercised by the Official Referee at this stage of the trial "in the like "manner and subject to the like limitations," unless that right of recall is in some way personal to the particular judge who heard the defendant give evidence in the first place. We see no reason why the right to recall should be regarded as the personal right of a particular judge rather than the right of the court which is properly seised of the matter at the time in question.

We are confirmed in this view by Order 36A, r. 9. On receipt of the Official Referee's report, the court may (a) adopt it in whole or in part; (b) vary the report; (e) decide the question or issue originally referred to him on the evidence taken before him either with or without additional evidence. If, in this case, the learned trial judge adopted course (e), it is clear, we think, that he could at that stage recall the defendant. It seems unreal to suppose that there is an intervening stage during which the court that is investigating the matter with all the powers of the trial judge is unable to recall the defendant.

It is suggested on the defendant's behalf that it would be a wrong use of discretion to recall the defendant since, it is said, the onus is still on the plaintiff. We do not agree. In this case the plaintiff has proved that the defendant is an accounting party, and (by admissions) that he has kept false books and lied in interrogatories in respect of the amounts received by him. That calls for some answer by him. Merely supplying through his legal advisers lists not verified in evidence by himself is no answer. Had the judge ordered an account to be taken (as he might well have done) the defendant would have had to verify his account by affidavit (R.S.C., Ord. 33, r. 4), and he could have been cross-examined on his affidavit after due notice given of the items to which the plaintiff objected. If no evidence from the defendant were available, it may be that the court would try to secure justice by drawing inferences; but, in fact, the defendant, who knows the truth of the matter, is available to be recalled. We cannot in such circumstances see that it would be a wrong use of discretion if the court were to recall him in the hope of finding out the truth.

We therefore dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker; J. H. Williams, Dartford.*

I. G. R. M.

REGINA v. COKAR.

C. C. A.
1960
April 11.
Lord Parker C.J., Ashworth and Salmon JJ.

Crime — Evidence — System — Acquittal on previous charge — Cross-examination as to previous charge—Whether permissible—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *proviso* (*f*) (i).

At the trial of the appellant for entering a dwelling-house by night with intent to steal, the appellant admitted climbing in through an open window of a dwelling-house at midnight, where he was found shortly afterwards by the occupant asleep in a chair before the fire. The defence was that the appellant had entered merely for warmth and in order to sleep. In spite of objection by the defence, the prosecution was permitted to cross-examine the appellant as to a previous occasion when he had been charged, but acquitted, to show that he knew it was no offence to be found on private premises for an innocent purpose. The appellant was convicted and sentenced to 18 months' imprisonment. On appeal against conviction on the ground, inter alia, that cross-examination as to previous proceedings resulting in an acquittal was contrary to section 1, proviso (*f*) (i) of the Criminal Evidence Act, 1898[1]:—

Held, that section 1, proviso (*f*) of the Act of 1898 completely prohibited any suggestion to an accused person that he had previously been charged, whatever the result of the charge, and that the exception contained in paragraph (i) only operated to lift the prohibition when it was sought to prove the commission of an earlier offence or conviction when proof of such offence or conviction

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[1] Criminal Evidence Act, 1898, s. 1: "Every person charged with an "offence, . . . shall be a competent "witness for the defence at every "stage of the proceedings, . . . Pro-"vided as follows: . . . (*f*) A "person charged and called as a wit-"ness in pursuance of this Act shall "not be asked, and if asked shall not "be required to answer, any question "tending to show that he has com-"mitted or been convicted of or been "charged with any offence other than "that wherewith he is then charged, "or is of bad character, unless—(i) the "proof that he has committed or been "convicted of such other offence is "admissible evidence to show that he "is guilty of the offence wherewith "he is then charged; . . ."

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1960

Reg. v. Cokar.

was admissible evidence; but that it was impossible under that exception to question the accused in regard to a charge of which he had been acquitted.

Dictum of Viscount Sankey L.C. in *Maxwell* v. *Director of Public Prosecutions* [1935] A.C. 309, 320; 50 T.L.R. 499; 24 Cr.App.R. 152, 172, H.L. explained.

Appeal against conviction.

The appellant, Jottai Cokar, a native of West Africa and a man of poor intelligence, was charged at County of London Sessions on February 9, 1960, with entering the dwelling-house of one James Ballantyne by night on January 14, 1960, with intent to steal.

The evidence was that at about midnight on January 14 he climbed through the open window of the house in Portland Grove, London, S.W.8, into a room in which Ballantyne was sleeping. Shortly afterwards Ballantyne woke up and found the appellant asleep in an armchair before the fire with his, Ballantyne's, coat over him. The appellant had apparently made no attempt to steal anything and there was loose money in the room which had not been touched. The defence put forward on behalf of the appellant was that he had entered the room to sleep because he was not feeling well, and had not intended to steal anything.

The prosecution sought to show that the appellant knew that it was no offence to be found on private premises for an innocent purpose, such as sleeping, and the deputy-chairman, F. H. Cassels, Esq., in spite of objection by the defence, permitted questions to be put to the appellant in cross-examination as to a previous occasion when he had been found on private premises and charged with entering the premises with intent. On that occasion he had been acquitted. The appellant was convicted and sentenced to 18 months' imprisonment. He appealed against conviction on the ground, inter alia, that cross-examination in relation to the previous proceedings in which he had been acquitted had been prejudicial and contrary to section 1 (*f*) of the Criminal Evidence Act, 1898. He also appealed against sentence.

Marilyn E. Wigoder for the appellant. At the trial, although objection was taken, the deputy-chairman allowed the prosecution to put to the appellant in cross-examination, questions relating to previous proceedings arising from an allegedly similar charge on which the appellant had been acquitted. The character of the appellant had at no stage been put in issue and, therefore, the questions should not have been put. [Reference was made to

Archbold's Criminal Pleading, Evidence and Practice, 34th ed. (1959), p. 493, para. 1304, and the Criminal Evidence Act, 1898, s. 1, proviso (*f*).]

[She was stopped.]

Michael Corkrey for the prosecution. From an examination of the cases it appears that the House of Lords does not regard the prohibition in section 1, proviso (*f*) of the Act of 1898 as absolute: *Maxwell* v. *Director of Public Prosecutions* [2]; *Stirland* v. *Director of Public Prosecutions*.[3] Admittedly, it is difficult to read the statute in the way that it has been read by the House of Lords in those cases.

From the evidence of the appellant it was clear that he was of low intellect and education. The prosecution thought it right to find out whether he knew what the law was having regard to the nature of his defence, namely, that he had entered the dwelling-house to sleep. The question was whether he was feigning sleep in the chair when he was discovered by the occupant.

[LORD PARKER C.J. If it were not for the purely obiter remarks of Viscount Sankey C.J. in *Maxwell's* case [4] I should have thought this case was unarguable.]

LORD PARKER C.J. This is in some ways a curious case. The appellant, a native of West Africa, was convicted at the County of London Sessions of entering a dwelling-house by night with intent to steal, and he was sentenced to 18 months' imprisonment. From that conviction he appeals to this court by leave of the court. [His Lordship stated the facts and continued:] The sole issue was: Had the appellant entered that night with intent to steal?

The appellant was a man of poor intelligence. He was cross-examined, and the answers he gave were very unsatisfactory and not by any means always to the point. The suggestion which the prosecution sought to make was that he, the appellant, knew that it was no offence if he was just found sleeping on the premises. Again, the answers were: "I do not know," and answers of that sort, and ultimately leave was sought to cross-examine the appellant as to a previous occasion on which he had been found on private premises and had been charged. In fact he had been acquitted, but it was sought to introduce this evidence to show that on the occasion of the previous charge he must have learned that to be on premises for an innocent purpose, such as sleeping, was in law no offence. The questions were allowed and the appellant was ultimately convicted.

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[2] [1935] A.C. 309; 50 T.L.R. 499; 24 Cr.App.R. 152, H.L.

[3] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13, H.L.

[4] [1935] A.C. 309, 320.

Whether or not those questions should have been allowed depends on the true interpretation of section 1 of the Criminal Evidence Act, 1898, and, in particular, proviso (*f*), by which it is provided: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character." There is a complete prohibition of suggesting to an accused person that he has been previously charged, whatever the result of the charge. The exceptions are threefold and, as is well known, the second and third exceptions are cases where the prisoner has put his character in issue by attacking the evidence of the prosecution or giving evidence himself of good character. No question of that sort is concerned in this case, and the sole question is whether the questions became admissible by reason of the first exception, contained in paragraph (i) of proviso (*f*), which is in these terms: "Unless—(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged." That, as is well known, is directed to the common class of case where evidence of previous convictions is admissible to show system, and matters of that sort. It is to be observed that the exception deals only with the case where proof that the accused has "committed or been convicted" of another offence is admissible evidence. There is no reference in the exception to being "charged" and, accordingly, it seems to this court that the prohibition against any of the matters in the first part of proviso (*f*) is only lifted when it is sought to prove that the accused has committed or been convicted of the other offence. Provided that proof of that other offence is admissible evidence, it would be clearly proper as leading up to proof of conviction to say to the prisoner: "Were you charged?" and, if the answer is "Yes," "Were you convicted?"; but it seems to this court quite impossible, under exception (i), to question a man in regard to a charge in respect of which he was acquitted.

Reference has been made to *Maxwell* v. *Director of Public Prosecutions*,[1] and, in particular, to a passage in the speech of Viscount Sankey L.C.,[2] where he said: "It does not result from

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[1] [1935] A.C. 309; 50 T.L.R. 499; 24 Cr.App.R. 152, H.L.

[2] [1935] A.C. 309, 320.

" this conclusion that the word ' charged ' in proviso (*f*) is otiose: " it is clearly not so as regards the prohibition; and when the " exceptions come into play, there may still be cases in which a " prisoner may be asked about a charge as a step in cross- " examination leading to a question whether he was convicted on " the charge." Pausing there, if exception (i) came into play and it was sought to prove that the accused had been convicted of the previous offence, it would be perfectly possible leading up to that to ask him in the first place whether he had been charged. Viscount Sankey continued: " or in order to elicit some evidence as to " statements made or evidence given by the prisoner in the course " of the trial on a charge which failed, which tend to throw doubt " on the evidence which he is actually giving, though cases of this " last class must be rare and the cross-examination permissible only " with great safeguards." The court has not found it altogether easy to understand what Viscount Sankey was referring to in that last passage, but it might well cover the case where the prohibition has been lifted by the prisoner putting his character in issue. True, he could not then be asked about the charge resulting in acquittal as negativing good character because, as has been said, such a charge or acquittal is merely a misfortune and does not tend to show bad character. But, the prohibition having been removed, it would be possible then to refer to a charge on which the prisoner had been acquitted in order to bring up evidence as to statements made at that trial which tended to conflict with the evidence which he was giving in the current trial. Read in that way, this court does not think that *Maxwell's* case [3] is in any way a proposition for the fact that questions may be put in regard to a charge resulting in an acquittal when the sole ground for removing the prohibition is exception (i), namely, proof that he has been charged and convicted of another offence.

In these circumstances, the court feels that cross-examination in this case on the lines referred to was wrongly allowed. It was clearly a matter which was bound to have a considerable influence on the jury, and the court feels that in all the circumstances the only possible course is to quash the conviction. Accordingly, the appeal is allowed and the conviction quashed. The prisoner is discharged.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

E. M. W.

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[3] [1935] A.C. 309.

1960
May 26.

Lord Parker C.J., Byrne and Donovan JJ.

In re A SOLICITOR.

Solicitor — Discipline — Summary conviction — Insulting behaviour occasioning breach of peace—Whether prima facie evidence of conduct unbefitting a solicitor—Sentence—Whether duty of committee to inquire into circumstances before imposing penalty—Metropolitan Police Act, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54 (13).

Solicitor—Discipline—Practice—Whether disciplinary committee may inquire as to record of solicitor after arriving at findings.

In 1956, a solicitor was convicted on two charges of indecent assault and the Disciplinary Committee, constituted under section 46 of the Solicitors Act, 1957, having found him guilty of conduct unbefitting a solicitor, ordered his name to be struck off the Roll of Solicitors. On appeal, that penalty was varied to a suspension from practice for two years. In 1959 the solicitor was summarily convicted under section 54 (13) of the Metropolitan Police Act, 1839,[1] of using insulting behaviour whereby a breach of the peace may have been occasioned, and fined £10, the maximum penalty; he did not appeal against that conviction or against the fine. The Disciplinary Committee found that he had been guilty of conduct unbefitting a solicitor. There was no evidence before the committee of the events which resulted in that conviction, and the solicitor gave no explanation of them, or of the nature of the offence. It appeared that after reaching that decision, the committee, in accordance with their usual practice, inquired of their clerk as to the solicitor's record. Having done so, they stated in their published findings and order that the fact that the solicitor had again been convicted confirmed them in their previous view that he was not a person who should be allowed to remain a member of the profession, and they ordered that his name be struck off the roll. On appeal against both the findings and the order:—

Held, (1) that although a mere conviction for any criminal offence was not today prima facie evidence of conduct unbefitting a solicitor, a conviction for an offence under section 54 (13) of the Metropolitan Police Act, 1839, particularly when the maximum penalty was imposed, tended to bring the profession as a whole into disrepute and could only be regarded as such conduct; the findings of the committee in that regard, therefore, were right.

In re Weare [1893] 2 Q.B. 439; 9 T.L.R. 595, C.A. considered.

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[1] Metropolitan Police Act, 1839, s. 54: ". . . Every person shall be "liable to a penalty . . . who, within "the limits of the metropolitan police "district, shall, in any thoroughfare "or public place, commit any of the "following offences; (that is to say) ". . . (13) Every person who shall "use any threatening, abusive, or "insulting words or behaviour . . . "whereby a breach of the peace may "be occasioned: . . ."

Metropolitan Police Act, 1839 (Amendment) Act, 1958, s. 1: "Every "person who is convicted of an "offence under paragraph (13) of sec"tion 54 of the Metropolitan Police "Act, 1839, shall be liable on sum"mary conviction to a fine not "exceeding £10 . . ."

(2) That the practice of the committee in inquiring into the record of a solicitor after arriving at their findings and before considering the penalty was proper and not open to objection.

(3) But that it was inappropriate to subject a solicitor to the maximum penalty and to strike him off the roll in respect only of a conviction under section 54 (13) of the Act of 1839; that paragraph covered a number of different circumstances, and the committee were not entitled to assume that the offence was of the same nature as the previous offences, it being their duty, even though the solicitor made no attempt to explain, to inquire into the circumstances; and that, as there was no evidence before the committee as to those circumstances, the penalty should have been considered on the basis that the solicitor had been convicted of the two previous offences and had now been convicted of an offence which might have been of a trivial nature. On that basis, the appropriate penalty was a suspension of one year, and since there was no question of professional misconduct, the court would vary the order of the committee accordingly.

Appeal under section 48 of the Solicitors Act, 1957.

On December 31, 1959, an application was made on behalf of the Law Society that the appellant, a practising solicitor, might be required to answer an allegation that, having been convicted and sentenced for a certain criminal offence, he had been guilty of conduct unbefitting a solicitor, and that his name be struck off the Roll of Solicitors, or such other order might be made as the Disciplinary Committee constituted under section 46 of the Solicitors Act, 1957, might think fit.

The following facts were proved or admitted before the committee:

The appellant solicitor was admitted as a solicitor in 1932 and at the material times was carrying on practice in his own name. On August 25, 1959, he was convicted at Marlborough Street Magistrates' Court on a charge under section 54 (13) of the Metropolitan Police Act, 1839, of using insulting behaviour whereby a breach of the peace may have been occasioned, and was fined £10. There was no appeal pending by the solicitor against that conviction.

Counsel on behalf of the solicitor said that he had not been convicted of any professional misconduct or of any misconduct of a serious nature; that section 54 of the Metropolitan Police Act, 1839, listed offences of a summary and minor nature in respect of which the maximum penalty had, until 1958, been only 40s.; that the maximum fine now permissible under the section, £10, had admittedly been imposed on the solicitor, but even so, it was submitted, he had not been guilty of conduct unbefitting a solicitor, particularly bearing in mind that the conviction in respect of the offence (to which he still did not admit) in no way related to his professional activities, and had been recorded in a locality far away from where he practised; and that, even if the committee were not prepared to accept that submission, they should not impose any harsh penalty upon the solicitor, in support of whose professional reputation four affidavits were produced to the committee.

The committee's findings and orders were: "The committee "find the allegation made against the [solicitor] to have been "substantiated. The fact that a solicitor has been convicted of "an offence of this nature tends to bring the profession as a whole "into disrepute and conduct which results in a conviction for such "an offence can only be regarded as unbefitting a solicitor. On "the 8th June, 1956, the committee found an allegation to have "been substantiated that the [solicitor], having been convicted "and sentenced for certain criminal offences, viz., on two charges "of indecent assault, had been guilty of conduct unbefitting a "solicitor and ordered the name of the [solicitor] to be struck off "the Roll of Solicitors of the Supreme Court. On the 4th "October, 1956, a Divisional Court of the Queen's Bench "Division [2] set aside the order striking the [solicitor's] name off "the roll and substituted therefor an order that the [solicitor] "should be suspended from practice as a solicitor for a period of "two years with effect from the 8th June, 1956.

"No evidence was before the committee of the events which "resulted in the [solicitor's] conviction in 1959. In 1956 the "committee reached the conclusion that the [solicitor] was not "a person who should be allowed to remain a member of an "honourable profession. Notwithstanding that the recent offence "of which he has been convicted was not related to the conduct "of his practice, the fact that the [solicitor] has been again "convicted confirms the committee in their previous view."

The committee ordered that the name of the solicitor be struck off the roll, and the solicitor appealed against both findings and order on the grounds that the allegation that he had been guilty of conduct unbefitting a solicitor was not substantiated; that the evidence before the committee did not justify a finding that he had been guilty of conduct unbefitting a solicitor; that the committee's findings and order were not made in respect of the allegation nor were they based upon the evidence before them;

[2] *In re a Solicitor* [1956] 1 W.L.R. 1312; [1956] 3 All E.R. 516, D.C.

that the committee wrongly considered matters not in evidence before them and/or not laid against the appellant solicitor; that the order made was too severe and the penalty should be reduced; and that the findings and order were wrong and contrary to natural justice.

John Rutter for the appellant solicitor. The findings of the Disciplinary Committee cannot be supported. The evidence before the committee did not establish the allegation of conduct unbefitting a solicitor. A bare conviction under section 54 (13) of the Metropolitan Police Act, 1839, does not necessarily amount to such conduct. A solicitor is only guilty of conduct unbefitting a solicitor if he has been guilty of a serious offence, or of gross misconduct. An offence under section 54 (13) may be of a trivial nature, and it is not enough for the complainant to point to the conviction alone. Nor is it enough for him to say that it might be a conviction for misconduct of a serious nature; the question for the committee is whether in fact this particular conviction was for conduct of such a nature. The onus is not on a solicitor to give an explanation of the events giving rise to a conviction, but it is for the committee to investigate the circumstances. The committee has wide powers of subpoena and it would have been open to the complainant to call evidence as to the nature of the offence.

If the conviction did establish conduct unbefitting a solicitor, having regard to the evidence, it was not such as to call for such a drastic exercise of the committee's powers as to strike the appellant off the Roll of Solicitors. It was not a conviction for felony or misdemeanour, but for a summary offence which might well have been trivial. In the absence of evidence as to the events leading up to the conviction it is a matter of speculation whether it was a trivial or a serious offence. The committee are not entitled to assume the worst. The hearing before them should be conducted as far as possible in accordance with the practice of the courts of law. In a criminal court previous convictions must be proved and the defendant given an opportunity to deal with them. But none of the matters relating to the history of the appellant set out in the committee's findings was proved in evidence; there is no indication of the extent of the committee's information, from whom or when it was obtained, and neither by way of charge nor invitation was it put to the appellant so that he might have an opportunity to deal with it. The committee, therefore, in taking those matters into account when considering the penalty infringed the principles of natural justice: a defendant is entitled to know the case against him and to have an opportunity of answering it. The committee were considering the penalty to be imposed for the offence committed in 1959, not for the previous offences; the previous history of the appellant would have been relevant only if the 1959 offence was of a serious nature, and there was no evidence that it was. The committee in their findings and order were saying, in effect, that they would now restore that which the Divisional Court had altered in 1956. The duty of this court is to consider, in the same way as the Court of Criminal Appeal, whether in its opinion the sentence is appropriate to the misconduct proved, and, on the only evidence before the committee, this penalty was not.

This court has jurisdiction to review both findings and order. Where the conduct in question is not professional misconduct, the court can and will interfere with the committee's order (*In re a Solicitor*[3]), and on the same principles it can review the findings.

Peter Webster for the Law Society. It is the practice of the Disciplinary Committee, after hearing the evidence and arriving at their findings, to obtain from their clerk information as to any previous findings and orders relating to the solicitor concerned. That normal practice was followed in this case, and the information as to the solicitor's previous history was not before the committee when they were considering the facts of the case, but was obtained from the clerk to the committee after the findings had been arrived at.

[LORD PARKER C.J. Then the solicitor does not have an opportunity of dealing with any previous findings and orders?]

That is one result of the committee's practice. It must be remembered that this was not an allegation that an offence had been committed, but an application that the solicitor should be struck off the roll: see section 55 of the Solicitors Act, 1957. One trivial offence by itself might not amount to such conduct, but, taken in conjunction with two previous offences, it could well do so. Previous history, therefore, is relevant, and the complainant could have proved the previous convictions as germane to the issue of conduct unbefitting a solicitor. But, had he done so, the committee would have known the appellant's previous character before reaching their decision on the facts.

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[3] [1956] 1 W.L.R. 1312.

A conviction of a criminal offence is conduct unbefitting a solicitor unless the contrary is shown: *In re Weare.*[4]

[Lord Parker C.J. In this day and age is it right to say that conviction for any criminal offence is conduct unbefitting a solicitor? Times have changed and there are now a great many minor criminal offences, such as motoring and parking offences.]

It is conceded that nowadays a conviction of any criminal offence is not necessarily conduct unbefitting a solicitor, but the conviction raises the presumption, which may be rebutted by the nature of the offence, that the solicitor has been guilty of such conduct. In any event, a conviction under section 54 (13) of the Metropolitan Police Act, 1839, unless explained, does raise that presumption. Using insulting behaviour which might lead to a breach of the peace is conduct inconsistent with the stature of the profession and unworthy of an officer of the court. If such conduct is made out, it is for the solicitor to explain, and to give evidence in mitigation. It is true that it might have been a trivial offence, but the committee, although not entitled to do so themselves, may, and must, consider, from the terms of the conviction, whether a member of the public would assume the worst.

If the court upholds the finding of the committee that this was conduct unbefitting a solicitor, the Law Society does not desire to make any submissions to the court as to what is the proper penalty. In the light of *In re a Solicitor*[5] that is entirely a matter for the court. But they wish to be heard as to the matters which the committee were entitled to consider in making this order. These were the solicitor's previous history and the fact that the circumstances of the present conviction, being unexplained, remained unmitigated; so that the committee, in considering penalty, were entitled to assume, if not the worst possible particular offence, at least not the best one. It is conceded that to strike a solicitor off the roll would be inappropriate in the case of a trivial offence.

Rutter in reply. It is not any conviction for a criminal offence that is conduct unbefitting a solicitor. The conduct must be of such a nature as to make it expedient for the protection of the public or the profession that the solicitor be struck off the Roll. [Reference was also made to Halsbury's Laws of England, 2nd ed. (1938), vol. 31, para. 319, pp. 296–299.] The mere fact of a conviction does not make it imperative that a solicitor be struck off: see the judgment of Lopes J. in *In re Weare*.[6] In view of the wide range of conduct covered by section 54 (13) of the Act of 1839 it cannot be said, on the conviction alone, that the appellant was guilty of conduct of such a character. The only basis on which the court can approach the question of penalty is to assume the best, that is, that, in the absence of evidence, the offence was trivial. The worst ought not be assumed and nothing can be read into the conviction which would warrant the imposition of the maximum penalty of striking off.

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[4] [1893] 2 Q.B. 439; 9 T.L.R. 595, C.A.

[5] [1956] 1 W.L.R. 1312.

LORD PARKER C.J. This is an appeal by a solicitor from the findings and order of a Disciplinary Committee constituted under section 46 of the Solicitors Act, 1957, dated March 9, 1960, whereby it was ordered that the appellant solicitor should be struck off the Roll of Solicitors of the Supreme Court. The appeal is against both the findings and the order.

The short facts, so far as they were proved before the committee, were these: that the appellant was a solicitor who had been admitted in 1932, and at the material time was practising at Merthyr Tydfil; that on August 25 of last year he had been convicted under section 54 of the Metropolitan Police Act, 1839, of using insulting behaviour whereby a breach of the peace may have been occasioned and was fined £10; and, thirdly, that he had not appealed from and was not intending to appeal from that conviction. On those facts it was alleged that the appellant, having been convicted and sentenced for that offence, had been guilty of conduct unbefitting a solicitor. The committee found the allegation against the appellant to have been substantiated and said: "The fact that a solicitor has been convicted of an offence of this "nature tends to bring the profession as a whole into disrepute "and conduct which results in a conviction for such an offence "can only be regarded as unbefitting a solicitor." Pausing there, it is argued by Mr. Rutter on the appellant's behalf that that finding is not correct. He points out, and I think it is undoubtedly true, that today, at any rate, it is not a conviction of every type of offence that can be said to amount to conduct unbefitting a solicitor. There are passages in *In re Weare*,[1] in 1893, which would indicate that prima facie a conviction of any criminal offence makes a solicitor unfit to be a member of the profession, but it seems to me that, whatever may have been the position in 1893, today, with the multitude of minor criminal offences—to take only as an illustration, parking offences—it is really impossible to say that the mere conviction of any criminal offence is evidence of conduct unbefitting a solicitor. At the same time, I entirely agree with the committee that a conviction of an offence of this nature tends to bring the profession as a whole into disrepute, and that the conduct of the appellant solicitor can only be regarded as unbefitting a solicitor.

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[6] [1893] 2 Q.B. 439, 449, 450.

[1] [1893] 2 Q.B. 439; 9 T.L.R. 595, C.A.

The provision in question, paragraph (13) of section 54 of the Metropolitan Police Act, 1839, covers a multitude of different circumstances. Sitting here, we often have cases where the insulting words or behaviour whereby a breach of the peace may be occasioned occur in the course of indecent overtures and matters of that sort. At the same time it covers, as has been put in argument, abusive language and a quarrel with a taxi driver about the fare, and a multitude of different matters. Nevertheless, it seems to me that conduct resulting in a conviction with the maximum penalty, which is now £10, for using insulting behaviour whereby a breach of the peace may be occasioned is, even putting the best interpretation on it, conduct unbefitting a solicitor.

The next question is with regard to the penalty. As I have said, the appellant was struck off the Roll of Solicitors. Pausing there, it seems to me that on that conviction alone, and without knowing the circumstances, it would be quite wrong to strike a man off the Roll, which is the maximum penalty. The paragraph, as I have said, covers a number of different circumstances, and I think and, indeed, Mr. Webster conceded, that if the nature of the offence was, for instance, an argument with a taxi driver, it would be quite inappropriate to subject a solicitor to the maximum penalty and strike him off the Roll.

The committee, however, as I understand it, did not strike the solicitor off on that ground alone, because they went on to refer to the previous trouble which he had had. They said: "On "the 8th June, 1956, the committee found an allegation to have "been substantiated that the respondent, having been convicted "and sentenced for certain criminal offences, namely, on two "charges of indecent assault, had been guilty of conduct unbefitting a solicitor and ordered the name of the respondent to be "struck off the Roll of Solicitors of the Supreme Court. On the "4th October, 1956, a Divisional Court of the Queen's Bench "Division set aside the order striking the respondent's name off "the Roll and substituted therefor an order that the respondent "should be suspended from practice as a solicitor for a period of "two years with effect from the 8th June, 1956." They went on: "No evidence was before the committee of the events which "resulted in the respondent's conviction in 1959. In 1956 the "committee reached the conclusion that the respondent was not a "person who should be allowed to remain a member of an honourable profession. Notwithstanding that the recent offence of "which he has been convicted was not related to the conduct of "his practice, the fact that the respondent has been again convicted confirms the committee in their previous view." In other words, as I understand it, the committee are saying that having regard to what happened in 1956, the fact that he was suspended, and within a comparatively short time of resuming practice he was found guilty of this offence, is a ground for striking him off the roll. As to that, the first point taken on behalf of the appellant is that no evidence was given before the committee of what happened to him in 1956, and that he had no opportunity of dealing with it. The practice, we are told, is that any previous trouble a solicitor may have been in is not before the committee at all until after they have decided on their findings. Once having decided on their findings, and the only matter being as to penalty, they obtain from the clerk to the committee any previous findings and orders that there have been. For my part, I think that is a perfectly proper practice. It is true that under that practice the appellant or his counsel are not given any opportunity of dealing with his previous record. But at the same time if, which is most unlikely, the clerk should have made a mistake, the solicitor has the right to appeal to this court. I think that that is a perfectly good practice.

Accordingly, the question remains whether the maximum penalty of striking off was appropriate in the case of a man who had been convicted in 1956 of two charges of indecent assault, who had been suspended for two years and who, in August, 1959, was convicted of this offence under the Metropolitan Police Act, 1839. Section 54 of that Act covers a number of different circumstances, and there is little doubt in my mind that the committee suspected, as indeed I do myself, that the circumstances of this conviction were circumstances in which something in the nature of indecent overtures had been made. At the same time it may have been an offence of an entirely different nature. The committee had no evidence before them one way or the other as to the circumstances of that conviction.

It is said, and this is all that really can be said, that where the committee have the evidence of conviction it is for the solicitor to explain the circumstances and, in effect, to mitigate. I feel quite unable to subscribe to that view. It is always for the court, in this case the Disciplinary Committee, to inquire into the circumstances before they inflict a penalty, and certainly before they inflict the maximum penalty. There was suspicion here, suspicion increased by the fact that the solicitor himself made no attempt to explain the circumstances; but that of itself does not entitle the committee to assume that the offence was of the same nature as the offences in 1956. Accordingly, it seems to me that the right approach was to say: Here is a man who in 1956 was convicted of two charges of indecent assault, and in 1959 he is convicted of an offence which may well have been in regard to an argument with a taxi driver. In those circumstances, and merely on that, I do not think that the maximum penalty of striking him off the Roll was appropriate.

I should add that, in differing in the matter of the penalty, a matter which this court will never do in a case of professional misconduct, I only do so on the authority of *In re a Solicitor*,[2] where this court pointed out that they felt at liberty to interfere with the penalty because there, as here, the conduct was not in regard to his professional capacity.

As regards the penalty, we are as much in the dark as to the exact circumstances as were the committee, but, approaching the matter, as we have to, on the basis that this last offence may have been of an entirely different nature from the earlier offences, I would substitute a further period of one year's suspension.

BYRNE J. I agree and have nothing to add.

DONOVAN J. In this case, this solicitor was convicted of using insulting behaviour. There was no appeal, and I agree that that is conduct clearly unbefitting a solicitor, whatever the insulting behaviour was. At any rate, that is the conclusion which could legitimately be drawn by the Disciplinary Committee. For that offence I also agree that one year's suspension is much more appropriate than striking him off the Roll, and certainly not unjust in a case where a solicitor of set purpose remains dumb as to the

[2] [1956] 1 W.L.R. 1312; [1956] 3 All E.R. 516, D.C.

1960

A SOLICITOR, *In re.*

details of his offence, particularly when the solicitor has already been convicted of serious offences three years before.

Appeal allowed as to penalty.
No order for costs.

Solicitors: *Sharpe, Pritchard & Co. for Reginald Freedman & Co., Merthyr Tydfil; Hempsons.*

J. F. L.

1960
May 19, 20, 26.

McNair J.

KING *v.* CAVE-BROWNE-CAVE.

Landlord and Tenant—Covenant—Water rate—Liability of tenant—Covenant by tenant "to pay all existing and future rates . . . "imposed upon the demised premises"—Whether "rates" include water rates.

By an underlease the plaintiff demised to the defendant offices on the second floor of business premises together with the use in common with the tenants of the third floor of the lavatories and conveniences on the third floor. By a clause in the lease the defendant covenanted "to pay all existing and future rates taxes "assessments and outgoings whether parliamentary local or other-"wise now or hereafter imposed upon the demised premises except "only such as the owner is by law bound to pay notwithstanding "any contract to the contrary." The plaintiff, having been served with a notice of water rates in respect of the second and third floor of the premises, applied to the defendant for payment, which was refused:—

Held, that the charge to water rates fell within the covenant to pay "rates imposed upon the demised premises," and, accordingly, the defendant was liable to the plaintiff.

Bourne & Tant v. *Salmon & Gluckstein Ltd.* [1907] 1 Ch. 616, C.A. applied.

Badcock v. *Hunt* (1889) 22 Q.B.D. 145; 5 T.L.R. 148, C.A. not followed.

ACTION.

The plaintiff, Mrs. Annie King, was the lessor of a building known as 77, Chancery Lane, London, consisting of a shop with two floors above known as the 2nd and 3rd floors. During the war these two floors were extensively damaged by enemy action, and it was not until the autumn of 1956 that they were repaired ready for occupation. Before the war, the water supply to the building was provided by the Metropolitan Water Board by one service pipe from which internal pipes provided by the owner or occupier took the water to the different parts of the building.

By an underlease dated October 2, 1956, made between the plaintiff, therein called the lessor, and the defendant, Paul Astley Cave-Browne-Cave, therein called the tenant, it was provided, so far as is material, as follows: "Clause 1. In consideration of "the rents and the covenants on the part of tenants hereafter "reserved and contained the lessor hereby demises unto the "tenants all those the two front offices on the second floor of the "building known as No. 77, Chancery Lane, hereinafter called "the demised premises, together with the use in common with "other tenants of the third floor of the said building of the lavatories and conveniences on the third floor." The period of the lease was for 15¼ years less three days at a rent of £370 per annum. "Clause 2. The tenants hereby covenant with the "lessor as follows: (1) To pay the reserved rents on the days "and in the manner aforesaid; (2) To pay all existing and future "rates taxes assessments and outgoings whether parliamentary "local or otherwise now or hereafter imposed upon the demised "premises except only such as the owner is by law bound to pay "notwithstanding any contract to the contrary." By a deed of variation made on August 14, 1957, made between the same parties, the plaintiff demised to the defendant the two rear offices on the second floor upon the terms, covenants and conditions contained in the underlease.

Pursuant to these two documents, the defendant was in occupation of the whole of the second floor where he carried on his profession as a public relations officer. On the second floor there were no water facilities, but pursuant to the underlease the defendant had the use, in common with the tenants on the third floor, of a water closet and wash basin on the third floor, these being connected with the single supply pipe of the Metropolitan Water Board by internal water pipes furnished by the owner of the building.

Early in 1958, the Metropolitan Water Board served on the plaintiff a notice of water rate for the two quarters commencing April 1, 1958, stating it to be "on the undermentioned premises." In this notice the premises were described as "2nd floor front "offices and two rear offices" and "third floor offices," and against each was set the net annual value on which the water rate was based. Application was made on behalf of the plaintiff to the defendant for payment of the water rate and this was refused.

By this action the plaintiff claimed the sum of £36 13s. 1d. as the amount of water rate charged on the demised premises for the period October 22, 1956, to September 30, 1958. In the alternative the plaintiff claimed that the underlease should be rectified so that clause 2 (2) should read: "To pay all existing and future "rates taxes assessments and outgoings whether parliamentary "local or otherwise now or hereafter imposed upon the demised "premises except only such as the owner is by law required to "pay notwithstanding any contract to the contrary and in "addition to pay to the lessor the amount of such part of the "water rate payable by the lessor in respect of the supply of water "to the lavatories and conveniences on the third floor as the "Metropolitan Water Board may from time to time determine as "representing the benefit to the demised premises from the said "supply of water to the said lavatories and conveniences."

The defendant admitted that he had failed to pay to the plaintiff the amount of the water rate but denied that he was liable to pay it under the terms of the covenant. He further denied that the plaintiff was entitled to rectification.

Michael Eastham for the plaintiff. There are three questions: Is the water rate included in the word "rates" in the covenant? If it is, is it a rate in respect of the demised premises? Thirdly, is it "imposed" on the demised premises? As to whether rates include water rates, reliance is placed on *Bourne & Tant* v. *Salmon & Gluckstein Ltd.*,[1] which approved *Direct Spanish Telegraph Co.* v. *Shepherd.*[2] In *Bourne's* case[3] Cozens-Hardy M.R. said: "It has not been . . . suggested by anybody that in a "building of this nature, containing . . . lavatories and water "closets in that part of the premises which was demised . . . "the supply of water . . . by the Water Board was a matter of "option on the part of the tenants: it was clearly a matter of "necessity; it was an inevitable condition of the demise, and "was known by the parties to be so." It is true that in that case water was supplied in the demised premises, whereas in the present case the water is supplied to the third floor; but in *Drieselman* v. *Winstanley*[4] the tenant had only the right to use a lavatory in another part of the building, and it was, nevertheless, held that a covenant to pay rates and taxes included the water rate. So, in the present case, it can truly be said that the rate is in respect of the demised premises.

[1] [1907] 1 Ch. 616, C.A.
[2] (1888) 13 Q.B.D. 202.
[3] [1907] 1 Ch. 616, 619.
[4] (1909) 53 S.J. 631.

As to the third question, on the true construction of the present covenant, the word "impose" means that a rate based on the net annual value of this property is charged on the second floor premises. "Imposed" means charged upon. The distinction between domestic and business supply of water is clearly drawn in *Bourne's* case.[5]

Badcock v. *Hunt*[6] would appear to be against the plaintiff. In that case the Court of Appeal said that the supply of water was a sale of goods and the obligation to pay was voluntarily incurred, therefore it was not "imposed." It may be a voluntary decision by the tenant whether he is going to be supplied with water initially, but once he has indicated to the landlord that he wants water, it is not a sale of goods but the supply of water in respect of which a rate is imposed on him which he has no opportunity of avoiding and which can be enforced in the magistrates' court.

If the water rate is not included in the covenant, then the plaintiff is entitled to rectification of clause 2 (2).

George Dobry for the defendant. The defendant relies upon three points of law concerning water rates. First, the water rate was not imposed upon the demised premises or upon the premises as a whole. Secondly, it is established that a water rate is not a rate, but may be included in the word "rates" by intention of the parties in the particular covenant. Thirdly, a water rate is never imposed. With regard to the first point, the part of the premises to which water was supplied, that is, the lavatory and wash place, was not demised. There was no water on the demised premises. In all the relevant cases there was water on the demised premises. In the *Spanish Telegraph* case[7] there was no suggestion that the water rate was chargeable upon premises not demised.

[McNair J. Rates are imposed upon a person whether owner or occupier.]

A water rate is not a rate but payment for water supplied: see section 3 of the Waterworks Clauses Act, 1847. In *Bourne & Tant* v. *Salmon & Gluckstein Ltd.*[8] the water was supplied to the water closet on the demised premises. In *In re Floyd*[9] the water supply was on the demised premises. The only case in which there is a doubt is *Drieselman* v. *Winstanley*[10]: that case is not against the defendant, because the agreement was to pay all rates, not just those charged upon the demised premises, and because that was a summons to determine what covenants were included in such an agreement. The covenant is very different here. None of the authorities establish that where the water supply is not on the demised premises the tenant can possibly be liable for water rates. Clearly a water rate cannot be imposed in respect of a mere easement or a right to use a room in common with others: see Ryde on Rating, 10th ed., pp. 17, 262.

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[5] [1907] 1 Ch. 616, 619.

[6] (1889) 22 Q.B.D. 145.

[7] 13 Q.B.D. 202.

[8] [1907] 1 Ch. 616.

[9] [1897] 1 Ch. 633.

[10] 53 S.J. 631.

As to whether a water rate is a "rate" as generally accepted, Danckwerts J. in *In re Baker*[11] refers to the definition of water rate in section 3 of the Waterworks Clauses Act, 1847, distinguishes it from a rate under the Rating and Valuation Act, 1925, as defined by section 68 of that Act, and concludes that a water rate is a payment to be made for the supply of a commodity.

[McNair J. If the defendant has bought some water, why should he not pay for it?]

Because he has paid for it in his rent. With regard to *Spanish Telegraph Co.* v. *Shepherd*,[12] what Smith J. said is wrong if taken to be of general application, although it may be right with regard to the particular premises in that case. Finally, a water rate is never imposed. It is a payment for water supplied. The obligation to pay being voluntarily incurred by the person supplied: see *Badcock* v. *Hunt*, *per* Fry L.J.[13]

As to the application to rectify the terms of the covenant, there was no evidence that the agreement did not correspond with the contract entered into by the parties, and therefore, rectification should not be granted: see *Frederick E. Rose (London) Ltd.* v. *William H. Pim Jnr. & Co. Ltd.*[14]

Cur. adv. vult.

May 26. McNair J. read the following judgment: This case concerns the liability of the defendant as lessee of office premises on the second floor of No. 77, Chancery Lane, to pay to his landlord the amount charged by the Metropolitan Water Board in respect of water rates. [His Lordship stated the facts and continued:]

The statutory position seems to be, in summary, as follows: While the main provisions of the Water Act, 1945, apply to the Metropolitan Water Board, their powers are primarily derived from the incorporation into their private Acts of the Waterworks

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[11] [1954] 1 W.L.R. 1144, 1147, 1148; [1954] 2 All E.R. 790.

[12] 13 Q.B.D. 202, 206.

[13] 22 Q.B.D. 145, 148.

[14] [1953] 2 Q.B. 450; [1953] 3 W.L.R. 497; [1953] 2 All E.R. 739.

Clauses Acts, 1847 and 1863. By virtue of section 53 of the Act of 1847, every owner and occupier of a dwelling-house or part of a dwelling-house within the limits of the special Act * shall, where he has laid certain communicating pipes (i.e., internal pipes) and paid or tendered the water rate, be entitled to demand from the undertaking a sufficient supply of water for his domestic purposes, and by virtue of section 20 of the Act of 1863, there is a prohibition against any person, not being a person supplied with water by the undertakers, using any water supplied by the undertakers for use of any consumer of the water of the undertakers. Power is given to the undertakers to charge a water rate for water supplied for domestic purposes based on the net annual value of the premises.

In practice, in the case of buildings supplied by the board with a single supply of water but divided into separate hereditaments, the tenants of which have the use of water supplied by the board, the board, usually by agreement with the owner or head lessee of the building, make an assessment of the water rate which is in law payable by such owner or head lessee on the whole of the building, but dividing this assessment showing how much is payable in respect of each of the separate hereditaments, based upon the net annual value of such hereditaments, to enable such owner or head lessee to recover the share of the rate from the tenants in appropriate cases.

The representative of the board, called before me at short notice, was unable to produce the particular agreement relating to 77, Chancery Lane, but he stated that there may well have been such an agreement many years ago, but as far as it is a question of fact I infer that there was such an agreement. In a letter dated February 18, 1958, the assessment officer for the board stated in reply to a letter from the plaintiff's agent, setting out the position, that is, in effect, that the second floor tenant had the right to use the water closet and lavatory on the third floor, " that " situation you outline is quite common as many offices have no " individual water fittings and their occupiers have a right of access " to communal fittings elsewhere in the building. In those " circumstances the water rate is invariably charged on the net " annual value of all parts benefiting from the board's supply."

In these circumstances, the material question is whether this

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* By s. 2 of the Act of 1847, the expression " the Special Act " is construed to mean " any Act which shall " be hereafter passed authorising the " construction of waterworks, and " with which this Act shall be incorporated."

assessment of the water rate contained in the notice of assessment falls within the covenant "to pay all existing and future rates, "taxes, assessments and outgoings whether parliamentary, local "or otherwise, now or hereafter imposed upon the demised "premises." Unguided by authority and regarding this matter purely as a matter of construction, I should have little doubt that it did.

Giving to the words of the covenant their ordinary, natural meaning, it seems to me quite plain that that charge falls within the words: "rates imposed upon the demised premises," and I also think the covenant would be so understood by any person taking office premises in London. Such a person, whether paying an inclusive or exclusive rent, would naturally be interested in both general rates and the water rates.

It was argued, however, on behalf of the tenant, first of all, that inasmuch as there were no water facilities in the demised premises, the rate in question was not a rate imposed upon the demised premises. It is clear that the phrase "upon the demised "premises" is not strictly accurate since the rate is imposed on the owner or occupier: see section 38 of the Water Act, 1945. It is not a charge on the premises, see Lindley L.J. in *In re Floyd*,[1] and the expression, clearly, in effect, means in respect of the demised premises. I think it is also clear that in most of the authorities relevant on the question of payment of water rates as between landlord and tenant, such as *Direct Spanish Telegraph Co.* v. *Shepherd*,[2] *Badcock* v. *Hunt*,[3] *In re Floyd*,[4] and *Bourne & Tant* v. *Salmon & Gluckstein Ltd.*,[5] there were water facilities in the demised premises themselves, but in *Drieselman* v. *Winstanley*,[6] the tenant had no more than a right to use the lavatory in another part of the building. It was, nevertheless, held by Eve J. that that case was indistinguishable from *Bourne & Tant* v. *Salmon & Gluckstein Ltd.*[7]

The more formidable argument advanced on behalf of the tenant was based upon the word "imposed." It was urged that since the charge arose out of a private bargain between the user and the private owner, it was, in effect, merely the price of a commodity supplied privately, albeit that it fell within the words "water rate" as defined by the definition section, section 3 of the Waterworks Clauses Act, 1847. Reliance was placed on the decision in *Badcock* v. *Hunt*[8] and in particular the judgment of Fry L.J., where on the construction of a covenant by the lessor to pay all rates, taxes and impositions charged or assessed on the said premises, Fry L.J. said[9]: " It is argued that this charge for water " or so-called water rate is a rate or imposition within the meaning " of this covenant. It is a rate in one sense, because it is so called " in the statute, but it is in substance a payment for water sup- " plied. The obligation to pay it is one which is voluntarily incurred " by the person supplied because he is not bound to take the water. " The water company is compelled to supply, if required, but the " occupier is not bound to take a supply. Then can this be called " a parliamentary rate? I think that the meaning of that term " is clear, and that it refers to rates imposed by Parliament " on persons who have no choice whether they will come under " the obligation to pay them, but must pay them whether they " will or no. So also with regard to parochial rates, they are " rates imposed by the parochial authorities on persons who must " pay them whether they will or no. Then is this a rate that " comes within the words ' imposed otherwise howsoever ' ? In " my judgment it is not imposed at all within the meaning of " the covenant; it becomes payable by the voluntary action of the " person who chooses to take the water and thereby incurs the " legal liability to pay for it; it is not, like the rates and charges " previously mentioned in the covenant, an imposition by some " superior authority which a man becomes liable to pay whether " he will or no."

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[1] [1897] 1 Ch. 633, 637; 13 T.L.R. 278, C.A.

[2] (1883) 13 Q.B.D. 202, D.C.

[3] (1889) 22 Q.B.D. 145.

[4] [1897] 1 Ch. 633.

[5] [1907] 1 Ch. 616.

[6] (1909) 53 S.J. 631.

[7] [1907] 1 Ch. 616.

On the other hand, in *Bourne & Tant* v. *Salmon & Gluckstein Ltd.*,[10] the Court of Appeal expressly affirmed the Divisional Court in *Direct Spanish Telegraph Co.* v. *Shepherd*,[11] and upheld the judgment of Buckley J., who felt himself bound by the last-mentioned case, to hold that such a water rate was a " rate " within the terms of a lessor's covenant to procure to be paid all rates and taxes payable in respect of the said demised premises, and rejected the argument that the charge was not a rate because it was voluntarily incurred. See also *In re Floyd*,[12] where the distinction is drawn between the charge for water for trade purposes, which is a matter of private bargaining and not imposed, and water supplied for domestic purposes.

In my judgment, there is nothing in these authorities which persuades or compels me to adopt a construction of this covenant differing from that which appears to me to be correct, as set out earlier in this judgment. On the contrary, I am reinforced in the conclusion which I have reached by the decisions referred to and, in particular, by *Bourne & Tant* v. *Salmon & Gluckstein Ltd.*,[13] and I therefore hold that the water rate in question is within the expressed terms of the covenant.

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[8] 22 Q.B.D. 145.

[9] Ibid. 148.

[10] [1907] 1 Ch. 616.

[11] 13 Q.B.D. 202.

[12] [1897] 1 Ch. 633.

In those circumstances it is not necessary for me to consider in detail the alternative plea for rectification advanced by the plaintiff. It is sufficient for me to say that I am fully satisfied on the basis of the contemporary documents and on the evidence called on behalf of the plaintiff, that the estate agents negotiating on behalf of the plaintiff fully intended that the defendant should be liable to pay this water rate. I do not feel that the evidence in support of a common intention, which is necessary, was sufficiently precise to satisfy the very stringent test applicable in cases of rectification as set out in the judgment of Simonds J. in *Crane* v. *Hedgeman-Harris Co. Inc.*,[14] a judgment which was described by Greene, M.R. in the same case on appeal[15] as one of "conspicuous clarity."

There must, accordingly, be judgment for the plaintiff. As regards amount, the only water rate proved before me is the two quarters commencing April 1, 1958, amounting to £18 11s. 8d.

Judgment for the plaintiff with costs.

Solicitors: *Tackley Fall & Read; Jaques & Co.*

J. D. P.

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[13] [1907] 1 Ch. 616.

[14] [1939] 1 All E.R. 662, 664.

[15] [1939] 4 All E.R. 68, 71, C.A.

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May 11, 12.

Lord Parker C.J., Byrne and Ashworth JJ.

REGINA *v.* DORSET QUARTER SESSIONS APPEALS COMMITTEE. *Ex parte* WEYMOUTH CORPORATION.

Town and Country Planning — Enforcement notice — Appeal — Notice quashed by court of summary jurisdiction—Order for costs against local planning authority—Whether local planning authority entitled to appeal to quarter sessions against decision—Whether "person "aggrieved"—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 23 (5).

Words and Phrases—"Person aggrieved"—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 23 (5).

On the true construction of the Town and Country Planning Act, 1947,[1] a local planning authority is not " any person aggrieved " within section 23 (5), and, therefore, has no right of appeal from a decision of justices made under section 23 (4).

Where, therefore, justices, who, on an appeal under section 23 (4) of the Act, had quashed an enforcement notice served by a local planning authority, made an order for costs against the authority, and, quarter sessions having refused jurisdiction, the authority sought an order of mandamus directing quarter sessions to hear and determine an appeal by them under section 23 (5):—

Held, that the mere incidence of the order for costs against the authority, which the justices had power to make under the ancillary legislation of section 55 of the Magistrates' Courts Act, 1952, attracted and incorporated into the Act of 1947, did not give the authority a right of appeal under section 23 (5) and mandamus must be refused.

Ealing Corporation v. *Jones* [1959] 1 Q.B. 384; [1959] 2 W.L.R. 194; [1959] 1 All E.R. 286, D.C. and *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation* [1951] 2 K.B. 508; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032, D.C. applied.

Rex v. *Surrey Quarter Sessions, Ex parte Lilley* [1951] 2 K.B. 749; [1951] 2 T.L.R. 546; [1951] 2 All E.R. 659, D.C. considered.

APPLICATION for an order of mandamus.

On October 13, 1958, the applicants, the Weymouth Corporation, the local planning authority, served on the respondent, John Redvers Westmacott, an enforcement notice under section 23 of the Town and Country Planning Act, 1947, requiring him to discontinue the use of certain land as a site for caravans and to remove the caravans from the land. The respondent appealed against the enforcement notice pursuant to section 23 (4), and on December 5, 1958, the Weymouth justices allowed the appeal and quashed the enforcement notice and ordered the corporation to pay the respondent's costs of the appeal. The corporation appealed against that decision to Dorset Quarter Sessions, and on March 25, 1959, the appeals committee held that it had no jurisdiction to hear the appeal on the ground that the corporation were not a " person aggrieved " within section 23 (5) of the Act. On March 31, 1959, the corporation applied to quarter sessions to state a case for the opinion of the High Court, and on June 11 a draft case was submitted, but quarter sessions refused to state a case on the footing that, jurisdiction having been declined, there was no decision against which to appeal.

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[1] Town and Country Planning Act, 1947, s. 23: " (1) If it appears to the " local planning authority that any " development of land has been carried " out . . . without the grant of per- " mission . . . or that any conditions " subject to which such permission " was granted . . . have not been " complied with, then . . . the local " planning authority may . . . if they " consider it expedient so to do . . . " serve on the owner and occupier of " the land a notice under this sec- " tion . . . (2) . . . (hereinafter called " an 'enforcement notice') . . . " (4) If any person on whom an en- " forcement notice is served under this " section is aggrieved by the notice, " he may, . . . appeal against the " notice to a court of summary juris- " diction . . . and on any such appeal " the court—(*a*) if satisfied that per- " mission was granted . . . for the " development to which the notice " relates, or that no such permission " was required in respect thereof, or, " as the case may be, that the condi- " tions subject to which such permis- " sion was granted have been complied " with, shall quash the notice to " which the appeal relates; (*b*) if " not so satisfied, but satisfied that " the requirements of the notice " exceed what is necessary for restor- " ing land to its condition before " the development took place, or for " securing compliance with the con- " ditions, as the case may be, shall " vary the notice accordingly; (*c*) in " any other case shall dismiss the " appeal . . . (5) Any person aggrieved " by a decision of a court of summary " jurisdiction under the last foregoing " subsection may appeal against that " decision to a court of quarter " sessions."

The corporation, having on June 13 applied ex parte for, and obtained, an extension of time and leave to apply, now applied for an order of mandamus directed to the appeals committee to hear and determine their appeal. The grounds of the application were that the committee had wrongfully refused to hear and determine the appeal on the ground that the corporation were not a " person " aggrieved " within section 23 (5), and that they were wrong in law in holding that they had no jurisdiction to hear the appeal since, in law, the corporation was a " person aggrieved " within section 23 (5) of the Act.

J. Stuart Daniel and *J. R. B. Fox-Andrews* for applicant corporation. It is accepted that a planning authority cannot be " aggrieved " merely by an adverse decision of justices under section 23 (4) quashing an enforcement notice: *Ealing Corporation* v. *Jones.*[2] Nevertheless, where justices in so deciding make an order for costs against the authority, the authority is a " person " aggrieved " within section 23 (5). An order for costs against a local authority has been held to make the authority aggrieved under other statutes: see *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley* [3] and *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow.*[4] Had there been an order for costs in *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation,*[5] the court would have held the Westminster Corporation to be a person aggrieved within section 64 of the London County Council (General Powers)

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[2] [1959] 1 Q.B. 384; [1959] 2 W.L.R. 194; [1959] 1 All E.R. 286.

[3] [1951] 2 K.B. 749; [1951] 2 T.L.R. 546; [1951] 2 All E.R. 659.

[4] [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78.

[5] [1951] 2 K.B. 508; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032.

Act, 1947: see the *Surrey* case,[6] where Lord Goddard C.J., citing *Jennings* v. *Kelly*,[7] said[8]: "It is impossible for us to hold that, "once an order for costs has been made, the person who has "to pay the costs is not a person aggrieved." It has never been held that a party to a dispute of this kind against whom costs have been awarded was not a person aggrieved with a right of appeal, and it would be strange if an order for costs should give an authority a right of appeal under other branches of legislation but does not do so under this legislation. [Reference was also made to *Swindon Corporation* v. *Pearce and Pugh*.[9]]

"Person aggrieved" in section 23 (5) is a composite phrase to be looked at as a whole; both words must be considered in relation to each other and, therefore, it cannot be said that a planning authority, although "aggrieved," is not a "person." By section 19 of the Interpretation Act, 1889, person includes any body of persons, incorporate or unincorporate, unless the contrary intention appears. It is submitted that here no contrary intention appears. The word "person" in section 23 (5) is not defined, but the subsection contains no reference back to the "person on whom an enforcement notice is served" in subsection (4); had Parliament intended such a reference back it would have inserted the word "such." The expression "person "aggrieved" is ambiguous, as the court has often said, and, where it is a question of surmise as to the intention of Parliament, it is for the person alleging a contrary intention to make good his allegation. The onus is on the respondent to show that the planning authority is not within section 23 (5).

The passages in *Ealing Corporation* v. *Jones*[10] to the effect that had Parliament intended to give a right of appeal to a planning authority it would have said so clearly should be read in the light of the fact that the court was there considering a case in which no order for costs was made. The Act confers powers on the planning authority and, therefore, it is natural to find that the two different expressions "planning authority" and "person" are used to differentiate between the authority and the person affected by the act of the authority. But in another context, where "person" prima facie has a broader meaning, that broader meaning should not be limited merely because of the terms used in other parts of the Act. The similar differentiation

[6] [1951] 2 K.B. 749.

[7] [1940] A.C. 206; 56 T.L.R. 154; [1939] 4 All E.R. 464.

[8] [1951] 2 K.B. 749, 755.

[9] [1948] 2 K.B. 301; 64 T.L.R. 323; [1948] 2 All E.R. 119.

[10] [1959] 1 Q.B. 384, 392, 393.

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Reg. v. Dorset Quarter Sessions Appeals Committee. *Ex parte* Weymouth Corpn.

between "council" and "person" in the Public Health Act, 1936, did not prevent the court from holding in the *Surrey* case [11] that the Surrey County Council was a person aggrieved within section 301 of the Public Health Act, 1936: see, in particular, the judgment of Hilbery J.[12] As to the point raised by Ashworth J. in *Ealing Corporation* v. *Jones*,[13] that by virtue of section 100 of the Act of 1947 the Minister might be a "person "aggrieved" by a decision of a court of summary jurisdiction, it is not unsuitable or surprising that he should be a party to proceedings where his conduct is in question: see *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government*.[14] In certain circumstances, for example, under section 17, the Act envisages that he should be. By section 100 a notice served by the Minister has the like effect as a notice served by the local planning authority, so that the Minister may be a respondent to an appeal under section 23 (5); if he may be a respondent, there is no reason why he should not also be an appellant.

R. I. Threlfall for the respondent. A local planning authority is not a "person aggrieved" within section 23 (5) of the Act of 1947. Whether or not that phrase is to be treated as a composite phrase or, as in more recent cases, the words "aggrieved" and "person" are to be considered separately, two questions arise: first, does the statutory provision extend the right of appeal to the particular body claiming it or does a contrary intention within section 19 of the Interpretation Act, 1889, appear; and, if so, secondly, is that particular body of persons aggrieved in the circumstances of the case. There can be no question of onus on either party of showing whether a contrary intention does or does not appear, because it is a matter of the general impression left on the mind of the court on the balance of indications in the statute. It is submitted that in this statute Parliament has shown a contrary intention and that that was the impression left on the court in *Ealing Corporation* v. *Jones*.[15]

There are a number of indications in the Act of the contrary intention of Parliament the cumulative effect of which makes a strong case. First, by virtue of the words "under the last "foregoing subsection" the right of appeal in subsection (5) is restricted to an appeal against a decision of justices under subsection (4). But a planning authority cannot be aggrieved by any of the three courses open to justices under subsection (4) (*Ealing Corporation* v. *Jones* [15]), whereas the appellant before the justices may be aggrieved by two of those courses. It is more reasonable to suppose that Parliament intended only to confer a right of appeal on a person who could be aggrieved by such a decision than on an authority which could only be aggrieved if the justices went beyond the powers contained in subsection (4) and made an order for costs under ancillary legislation incorporated into the Act by, now, section 55 of the Magistrates' Courts Act, 1952. It would be giving too wide a construction to say that subsection (5) contemplated an appeal against any decision of the justices under the jurisdiction conferred by subsection (4), including the ancillary legislation. If the argument for the appellant is right, there would be the unusual situation in which a planning authority which was unsuccessful before the justices would ask for costs to be awarded against it, so that it could appeal, and a successful appellant would resist being given costs.

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[11] [1951] 2 K.B. 749.

[12] Ibid. 758.

[13] [1959] 1 Q.B. 384, 387.

[14] [1960] A.C. 261; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.

[15] [1959] 1 Q.B. 384.

Secondly, the Act throughout uses the words "local planning "authority" in contradistinction to "person": see sections 10 (3), 11 (1), 14 (3) (*c*) and 19 (5). Section 23 itself, in subsections (1) and (3), refers to a local planning authority by name, and the inference is that had Parliament intended to include a planning authority in subsection (5) it would have used the same formula. The answer to the argument that had it been intended to exclude a planning authority the word "such" would have been inserted in subsection (5), is that had Parliament intended an authority to have a right of appeal it would have said so clearly. On this point reliance is placed on the judgments of Lord Parker C.J. and Donovan J. in *Ealing Corporation* v. *Jones*.[16] See also the observations of Lord Goddard C.J. in *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation*,[17] in relation to the distinction drawn in the London County Council (General Powers) Act, 1947, between "borough council" and "person aggrieved," a point Croom-Johnson J. considered [18] "well nigh decisive." By contrast, in *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley*,[19] the court took the view that different considerations applied and that the Public Health Act, 1936, contemplated in section 301 a right of appeal by both parties. Lord Goddard C.J.[20] may

[15] [1959] 1 Q.B. 384.

[16] Ibid. 392, 393.

[17] [1951] 2 K.B. 508, 510, 511.

[18] Ibid. 513.

[19] [1951] 2 K.B. 749.

[20] Ibid. 755, 756.

have given the impression that he was resiling from the view which he had taken in the *Westminster* case,[21] but he had in fact taken the same view in the previous case of *Stepney Borough Council* v. *Joffe*.[22] This case is closer to the *Westminster* case [23] than to the *Surrey* case.[24] [Reference was also made to *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow*.[25]]

As further indications that Parliament did not intend "person" in section 23 (5) to include a local planning authority, reliance is placed on the point raised by Ashworth J. in *Ealing Corporation* v. *Jones* [26] that, if the contention for the applicant is right, the effect of section 100 would be that the Minister himself could be a "person aggrieved" by a decision of a court of summary jurisdiction. That would be a "surprising result," *per* Lord Parker C.J.,[27] and this point also impressed Donovan J.[28] Reliance is also placed on the alternative powers of control possessed by a local planning authority under section 26 of the Act of 1947: see the judgment of Donovan J. in *Ealing Corporation* v. *Jones*.[29] A person prosecuted under section 24 (3) may take any point which would have been open to him to take in an appeal under section 23 (4): *Francis* v. *Yiewsley and West Drayton Urban District Council*.[30] Should such a point succeed, the prosecution would fail and costs might be awarded against the local planning authority, but the authority, although it can ask for a case to be stated, has no right of appeal to quarter sessions against the dismissal of an information. It would be strange if, in the two sets of parallel proceedings, one civil and one criminal, the authority could appeal in the civil and not in the criminal.

Alternatively, an order for costs does not make a local planning authority "aggrieved" within section 23 (5). [Reference was also made to *Jennings* v. *Kelly* [31] and *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley*.[32]] Finally, it is submitted that, in view of the delay which has occurred, this is not a case in which the court should exercise its discretion to grant an order of mandamus: see *Reg.* v. *Ashford, Kent, Justices, Ex parte Richley*.[33]

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[21] [1951] 2 K.B. 508.

[22] [1949] 1 K.B. 599; 47 L.G.R. 189.

[23] [1951] 2 K.B. 508.

[24] [1951] 2 K.B. 749.

[25] [1952] 2 Q.B. 601.

[26] [1959] 1 Q.B. 384, 387.

[27] Ibid. 392.

[28] Ibid. 393.

[29] Ibid. 392, 393.

[30] [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529, C.A.

[31] [1940] A.C. 206.

[32] [1951] 2 K.B. 749.

[33] [1955] 1 W.L.R. 562; [1955] 2 All E.R. 327n.

Stuart Daniel in reply. The words "unless the contrary "intention appears" in section 19 of the Interpretation Act, 1889, mean that such an intention must positively appear. If, therefore, after examination of the statute the court is left in any doubt as to the meaning of "person" in section 23 (5), the planning authority are entitled to rely on the definition in the Act of 1889. The alternative power of control exercisable by a planning authority under section 26 of the Act of 1947 may have been a relevant consideration in *Ealing Corporation* v. *Jones*,[34] where the court was only considering whether the authority was "aggrieved," but it is irrelevant to the question whether the authority are within the composite phrase "person aggrieved." "Decision . . . under the last foregoing subsection" in section 23 (5) means a decision under the jurisdiction conferred by that subsection: since the power to award costs is part of the statutory background to any proceedings in a court of summary jurisdiction, it must be included in the jurisdiction conferred by subsection (4).

Where a draftsman has used an ambiguous expression such as this, the rational view is that he did so because it was an expression which had been used before and that he did not address his mind to the consequences. In the circumstances, therefore, the question is how far, if at all, the court will cut down the scope of a statutory right of appeal by reference to principles enunciated in previous decisions under similar statutes using the same expression, and a subtle analysis of the section and what might have been intended is unrealistic. No inference should be drawn from the nomenclature used in the Act. The Act, when conferring powers or a duty, necessarily refers to the authority by name, but the fact that it does so, for example, in section 19 where several persons are concerned, does not mean that the authority is not a person in section 23 (5), which is concerned only with two persons. Such an inference would be inappropriate in section 11, under which a local planning authority, which is often a property owner, could, as a property owner, be a "person aggrieved." The argument by reference to section 24 does not assist the respondent; different principles govern a right of appeal in civil and criminal proceedings, and, moreover, an unsuccessful prosecutor may appeal by case stated. It is not surprising that there should be a right of appeal only if an order for costs is made. Apart from authority, it is natural to expect a right of appeal from an adverse decision, and in *Ealing Corporation* v. *Jones*[34] the court was driven to its conclusion that there was no right of appeal by previous decisions. But there are very persuasive dicta in both *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley*[35] and *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation*[36] that if an order for costs is made an authority is an aggrieved person. In the *Surrey* case[37] Lord Goddard C.J. said[38] that he had intended to found his decision in the *Westminster* case[39] on the point that the person there was not a person "aggrieved."

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[34] [1959] 1 Q.B. 384.

LORD PARKER C.J. In these proceedings Mr. Daniel moves on behalf of the applicants, the Weymouth Corporation, for an order of mandamus to Dorset Quarter Sessions Appeals Committee, directing them to hear and determine according to law an appeal made by the corporation against the decision of the borough justices quashing an enforcement notice served by the corporation on the respondent, one J. R. Westmacott.

The short history of the matter, so far as it is material, is as follows: The corporation served an enforcement notice on the respondent, pursuant to section 23 of the Town and Country Planning Act, and thereupon, as he was entitled to do under subsection (4) of that section, he appealed against the notice to the borough justices. On December 5, 1958, the justices allowed the appeal and quashed the enforcement notice. In so doing, they made an order against the corporation to pay costs. Thereafter, the corporation appealed to Dorset Quarter Sessions who refused jurisdiction on the ground that, in their opinion, the applicants were not within the words "any person aggrieved" in section 23 (5). Thereafter there was some delay because the corporation conceived that their proper method of challenging the refusal of jurisdiction by quarter sessions was to appeal by way of case stated. It was not, as I understand it, until the case was almost agreed and ready for signature that they appreciated that quarter sessions would refuse, as they did, to state a case, taking the point that a matter such as this, a refusal of jurisdiction, fell to be dealt with by mandamus and not by case stated. Accordingly, it was not until June 13, 1959, that an application was made ex parte to this court to move for an order of mandamus. Leave was granted and the matter now comes before the court.

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[34] [1959] 1 Q.B. 384.
[35] [1951] 2 K.B. 749.
[36] [1951] 2 K.B. 508.
[37] [1951] 2 K.B. 749.
[38] Ibid. 755.
[39] [1951] 2 K.B. 508.

Section 23 of the Town and Country Planning Act, 1947, is a section which has come before this court only too often, and I find it unnecessary to read the section in full; it will be enough if I read the relevant parts of subsections (4) and (5). [His Lordship read those parts of subsections (4) and (5) and continued:]

This case is concerned with whether the local planning authority, the applicants in this case, can come within the words "any person aggrieved" in section 23 (5). By section 19 of the Interpretation Act, 1889, "person" includes any body of persons, corporate or unincorporate, unless the contrary intention is expressed, and the question is whether in its context, there is here a contrary intention. Certain things are clear so far as this court is concerned: first, that a local planning authority cannot claim to be aggrieved merely because an enforcement notice has been quashed. It is enough to refer in that connection to *Ealing Corporation* v. *Jones.*[1] In that case, which followed previous decisions of this court, *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation,*[2] and *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow,*[3] it was held that the expression "person aggrieved" does not cover an authority charged with certain duties under an Act of Parliament which has been frustrated in the performance of what it thought was its public duty. Secondly, it is clear that any person against whom an order for costs has been made is a "person aggrieved." Mr. Threlfall in the present case sought to argue that although that might be so in general, there were certain words in section 23 (5) which showed that under that section a person who had been ordered to pay costs was not necessarily a "person aggrieved." I find it unnecessary to deal with that contention. As at present advised, I am satisfied that any person against whom an order for costs is made can be said to be a "person aggrieved."

So much is clear, but the real question here is whether in its context the phrase "any person aggrieved" is apt to cover a local planning authority. In other words, has Parliament evinced an intention to the contrary within section 19 of the Interpretation Act? That point was specifically reserved by this court in *Ealing Corporation* v. *Jones.*[4] The first thing to observe is that by section 23 (4) the justices are authorised to do one of three

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[1] [1959] 1 Q.B. 384; [1959] 2 W.L.R. 194; [1959] 1 All E.R. 286.

[2] [1951] 2 K.B. 508; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032.

[3] [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78.

[4] [1959] 1 Q.B. 384.

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C.J.

different things: to quash, to vary or to dismiss. In not one of those three cases, having regard to the decisions, could a local planning authority be aggrieved merely because they would have been frustrated in the performance of what they thought was their duty. It is said, however, and rightly said, that the procedure contained in what is now section 55 of the Magistrates' Courts Act, 1952, and rule 30 of the Magistrates' Courts Rules, 1952, is attracted and incorporated, and there is no doubt that in an appeal under subsection (4) the justices have power to make such order as to costs as they think fit. Accordingly, so it is argued for the applicants in this case, an order for costs is something which must be taken to be contemplated by subsection (4), and, that being so, a local planning authority ordered to pay costs is prima facie a "person aggrieved," and there is nothing here to show an intention to the contrary.

I find this by no means an easy question, but I have come to the conclusion that Parliament here has evinced an intention to the contrary. Once it is realised that in regard to the three decisions authorised expressly by subsection (4), a local planning authority could have no right of appeal at all, it seems to me absurd in the extreme that they should have such a right by the mere incidence of having had an order for costs made against them. As Mr. Threlfall said in his forceful argument, one might see a dissatisfied local planning authority saying: "Please make "an order for costs against me and then I can appeal." To my mind, the matter then becomes quite absurd. I prefer to look at it in this way, that Parliament never intended a local planning authority to have an appeal on the merits because they would not be aggrieved, and it would be the height of absurdity that there should be an appeal on the merits if, and only if, an order for costs were made against them. I think that those considerations show that a contrary intention is expressed in the very words of this section.

Another matter which reinforces me in the view that I take of this case is a consideration, not only of the section but of the Act itself, in regard to the use made of the words "person" and "local planning authority." It is unnecessary to go through the various sections, but in no case that I have been able to find is a local planning authority included in the word "person." Mr. Daniel has pointed out what is undoubtedly true, that that is very natural because, in general, powers are being given to local planning authorities; a local planning authority may do this or may do that, and in such a context the word "person" would be quite inapt, and a local planning authority would have to be named as such. Nevertheless, there are many cases—I need only mention section 10 (3) and section 14 (3) (*c*)—where it would have been possible to use the word "person" to cover both the local planning authority and the person affected by the act of the local planning authority.

It was this argument which found favour with this court in the *Westminster* case.[5] Lord Goddard C.J. said[6]: "In the "present case, the corporation, having cancelled the registration "of several street traders, they appealed, and the magistrate "reversed the cancellation. The question which arises is whether "the corporation have any right of appeal under section 64 of "the Act of 1947. I adhere to the opinion which I expressed in "*Stepney Borough Council* v. *Joffe*,[7] where I said, although I did "not actually decide it: 'It is, perhaps, not without importance "'to notice that by section 64 of the Act from the magistrate's "'decision a further appeal is given to quarter sessions, which "'would certainly enable the trader, though not, I think, the "'borough council, to appeal.'" He goes on[8]: "In my opinion, "a borough council are not given an appeal by section 64, and I "think for several reasons. In the first place, as Streatfeild J. "has pointed out during the argument, wherever a borough "council are mentioned in this Act they are always mentioned as "the borough council, and a person who may be affected by their "orders and so forth is referred to as a 'person,' and the appeal "which is given by section 64 is given to 'any person deeming "'himself aggrieved.' In view of the structure of the Act and of "the expressions used in the earlier sections, if it was intended "to give a borough council an appeal, I should have expected "that the section would have said: 'Any person or any borough "'council deeming themselves aggrieved.'" That was the reason which was put first and foremost in that case by Lord Goddard. Croom-Johnson J. based his decision on that point. He said[9]: "Speaking for myself, I should want very plain language, and "very cogent arguments, before I should be disposed to say that "the tribunal, whose order has been set aside, thereupon become "persons aggrieved so that they can appeal against the order of "the notional court of appeal which has set aside their order."

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[5] [1951] 2 K.B. 508.

[6] Ibid. 510.

[7] [1949] 1 K.B. 599; 65 T.L.R. 176; [1949] 1 All E.R. 256.

[8] [1951] 2 K.B. 508, 510.

[9] Ibid. 512.

It is true that in that case no order for costs had been made, but it is quite clear from the reasoning in the judgments that the same decision would have been arrived at if an order for costs had been made.

In *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley*,[10] the matter went the other way. The section giving the right of appeal was a section not contained in the Act under consideration, the Nurseries and Child-Minders Regulation Act, 1948, but a section of the Public Health Act, 1936, which was incorporated in the Act of 1948. The section in question, section 301 of the Act of 1936, provided that: " Subject as hereinafter provided, where a " person aggrieved by any order, determination or other decision " of a court of summary jurisdiction under this Act is not by any " other enactment authorised to appeal to a court of quarter " sessions, he may appeal to such a court," and then there was a proviso: " Provided that nothing in this section shall " be construed as conferring a right of appeal from the decision " of a court of summary jurisdiction in any case if each of the " parties concerned might under this Act have required that the " dispute should be determined by arbitration instead of by such " a court."

Those being the words of the section, Lord Goddard C.J. said [11]: " In some circumstances a party may go to arbitration " instead of going to justices, and the proviso enacts that if either " of the parties desires arbitration and has not asked for arbitration but has gone to justices, then he cannot appeal to quarter " sessions. That seems to indicate that it was in the mind of the " legislature that unless this provision had been put in either one " of the parties might have appealed."

It seems to me that this court should follow the reasoning in the *Westminster* case.[12] It is true, of course, that each case must depend upon the exact wording of the statute, but in the present case the wording is much closer to that in the *Westminster* case [12] than in the *Surrey Quarter Sessions* case.[13] As I have already said, in the *Surrey Quarter Sessions* case [13] the section in question showed that " person " was being used as equivalent to " party." It was, moreover, a section taken from the Public Health Act, 1936, which would cover many cases where local authorities were involved, whether as defendants or as plaintiffs. Applying those considerations, it seems to me that Parliament, had it intended the planning authority to have a right of appeal would have said in subsection (5): "any person or any local planning authority "aggrieved by a decision of the court."

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[10] [1951] 2 K.B. 749; [1951] 2 T.L.R. 546; [1951] 2 All E.R. 659.

[11] [1951] 2 K.B. 749, 753.

[12] [1951] 2 K.B. 508.

[13] [1951] 2 K.B. 749.

For my part, I base my judgment on those two grounds. A number of other arguments were addressed to us—contentions based on the additional powers given to a local planning authority under section 26 of the Act; an argument based on section 24 (3) under which the same considerations might be involved as under section 23 (4), but where it is clear that the local authority could not appeal at all, and also arguments based on the fact that if a local planning authority could be a person within the words "any "person aggrieved," so also could the Minister: see in this connection section 100 and also section 41 (1). However, I do not base my judgment on a consideration of any of those matters, but merely on the two grounds to which I have referred.

Finally, I should mention that we were invited in this case, in any event, not to exercise our discretion to grant the order having regard to the delay. Again that is a matter which I find it unnecessary to consider, though I think it right to say, in case the case goes further, that, as at present advised, I would have held that delay was no bar.

For these reasons I think that an order of mandamus should be refused.

Byrne J. I agree. I confess that I have found this a very difficult matter but I have come to the same conclusion as my Lord and, in those circumstances, I have nothing to add.

Ashworth J. I also agree.

Application refused.

Solicitors: *Blundell, Baker & Co. for Town Clerk, Weymouth; Sharpe, Pritchard & Co. for Percy Smallman, Weymouth.*

J. F. L.

1960
May 16, 17.

Lord Parker C.J., Donovan and Davies JJ.

ROGERS *v.* ARNOTT.

Crime—Larceny—Bailee, by—Attempted sale of bailed goods—Whether larceny or attempt—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (1).
Conversion—Act of—Offer for sale—Crime.
Nemo bis vexare debet — Acquittal — Charge of attempt dismissed — Whether accused triable for full offence.

The prosecutor, having received certain information, by arrangement met the defendant, who produced a tape recorder (which he had borrowed), demonstrated it and offered to sell it to the prosecutor for £35. The defendant was charged with attempting to steal the tape recorder under section 1 (1) of the Larceny Act, 1916, the proviso to which enacts: " . . . a person may be guilty of stealing any "such thing notwithstanding that he has lawful possession thereof, "if, being a bailee . . . thereof, he fraudulently converts the same "to his own use or the use of any person other than the owner." The magistrate found that at the time when the defendant met the prosecutor, he intended to sell him the tape recorder and knew that he would be acting dishonestly in so doing. The magistrate was of opinion that at the time of the attempted sale the defendant had already stolen the tape recorder and was therefore not guilty of a mere attempt. The prosecutor appealed:—

Held, dismissing the appeal, that (1) a sale of property by a bailee, contrary to the terms of bailment and for his own benefit, was clearly a conversion within the terms of the proviso to section 1 (1) of the Act of 1916.

(2) Where a person was lent property and then determined in his own mind to sell it for his own benefit contrary to the terms of the bailment, he had determined that in relation to the property he would no longer be a borrower but an owner, and an owner wishing to sell; when he proceeded to carry that intention into effect by offering the property for sale, he had already converted the property to his own use whether the attempted sale took place or not. Accordingly, the defendant had at the time when he offered the tape recorder for sale committed the offence of larceny and, therefore, could not be convicted of an attempted larceny.

Reg. v. *Jackson* (1864) 9 Cox C.C. 505 and *Reg.* v. *Reeves* (1859) 5 Jur.N.S. 716 considered.

Kenny's Outlines of Criminal Law (17th ed., p. 255, para. 245) and Russell on Crime (11th ed., p. 1095) approved.

Quaere: Whether the defendant, who succeeded on the grounds that he committed the full offence of larceny and not merely an attempt, could not now be tried for the full offence.

CASE STATED by Alderman Sir Seymour Howard sitting at Guildhall, London.

The prosecutor, Henry Rogers, a constable in the City of London Police, preferred a charge against David George Metcalfe

Arnott, the defendant, that he did at the National Car Park site, Warwick Lane, London, on June 19, 1959, attempt to steal a Type T.K. 20 Grundig tape recorder, No. 106437, value £54 12s., the property of F. R. Kelly, trading as Kelly's Radio of Fulham Road, London, S.W., contrary to section 1 of the Larceny Act, 1916.[1] The magistrate heard the charge on July 29, 1959, when the defendant, having consented to summary trial, pleaded not guilty, and after due hearing the magistrate found the defendant not guilty and dismissed the charge. The magistrate found the following facts:

On June 19, 1959, the prosecutor, as a result of information received, went to Holborn Viaduct and there met the defendant at about 8.30 p.m. The prosecutor with the defendant then went to the National Car Park site, Warwick Lane, E.C., where the defendant produced from a jeep a Grundig tape recorder, T.K. 20, No. 106437, which he demonstrated and offered for sale to the prosecutor for £35. The prosecutor then disclosed that he was a police officer and arrested the defendant. The tape recorder was the property of Frederick Richard Kelly, trading as Kelly's Radio of Fulham Road, S.W., and the subject of a hire-purchase agreement between Kelly and R. Wayment of Elm Park Mansions, S.W. The tape recorder had been lent to the defendant by one White, who at one time shared a flat with R. Wayment at Elm Park Mansions. At the time when the defendant met the prosecutor he intended to sell to him the tape recorder, and knew that he would be acting dishonestly in so doing.

It was contended on behalf of the defendant that there had been asportation of the tape recorder; that, therefore, the offence committed amounted to larceny, and that on the offence charged there was no case to answer.

It was contended on behalf of the prosecutor that the defendant was in possession of the tape recorder as a bailee, and that the conversion was not complete inasmuch as the disclosure by the prosecutor of his identity prevented the conclusion of the sale and that, therefore, the offence of larceny was incomplete.

The magistrate was of opinion that at the time of the attempted sale the defendant had already stolen the tape recorder and therefore found the defendant not guilty of the offence charged.

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[1] Larceny Act, 1916, s. 1: " . . . " (1) a person steals who, without the " consent of the owner, fraudulently " . . . takes and carries away any-" thing capable of being stolen with " intent, at the time of such taking, " permanently to deprive the owner " thereof: Provided that a person may " be guilty of stealing any such thing " notwithstanding that he has lawful " possession thereof, if, being a bailee " . . . he fraudulently converts the " same to his own use or the use of " any person other than the owner: " . . ."

The prosecutor appealed.

A. M. Jennings for the prosecutor. The magistrate dismissed the charge on the ground that as the defendant had committed the felony of larceny he could not be found guilty of the misdemeanour of attempted larceny. It is the prosecution's submission that the offence of larceny was incomplete and therefore the defendant was correctly charged with an attempt and not the full offence. A consideration of the civil action based on the tort of trover or conversion, as defined in Salmond on Torts, 12th ed., p. 233, and Clerk and Lindsell, 11th ed., p. 422, is relevant; in such a case the plaintiff has to prove that he has lost or been deprived of the property in question. In the present case none of the definitions of conversion is satisfied, because the defendant did not part with the property in or the possession of the tape recorder.

The defendant was the rightful bailee. The conditions of the bailment were not gone into and it was not shown how White came into possession. The facts did not show whether in taking the recorder to the National Car Park site the defendant was acting outside his authority; but there was no reason to suppose that he was doing anything unlawful. He went to the appointment because he got a telephone call and was curious. It was only when he got there that he decided to sell. The offer was made and then the transaction stopped because the police officer disclosed his identity. At that time there was no complete actus reus, and accordingly the defendant was rightly charged with an attempt. There is no direct authority on the difference between an attempt of larceny by a bailee and the full offence, nor any contrary to the prosecution's submission. [Reference was made to *Reg.* v. *Jackson*[2] and *Lancashire Waggon Co.* v. *Fitzhugh*.[3]]

Basil Wigoder for the defendant. The defendant was a bailee. He was in lawful possession of the tape recorder, and therefore the proviso to section 1 (1) of the Larceny Act, 1916, applies. The question is whether the defendant, in taking the tape recorder and offering it for sale, fraudulently converted it. One has not heard of attempted fraudulent conversion because, if one attempts a fraudulent conversion, one commits the full offence. The tort of conversion is of no assistance, because it involves the right to title against an innocent purchaser. Once the defendant decided to keep the appointment to sell the tape recorder, and certainly once he had put it into the car, he committed an act of conversion. Although the case stated does not indicate the terms of the bailment, the evidence showed that the bailment did not include taking the recorder into the car and offering it for sale. However, the defendant is content if the case is dealt with on the basis that an offer for sale without authority is fraudulent conversion. The defendant supports the magistrate's decision as far as it goes, but there are insufficient facts. The defendant's case is that attempting to sell was the stealing, and if that is right the facts do not matter.

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[2] (1864) 9 Cox C.C. 505.

[3] (1861) 6 H. & N. 502.

The authorities, *Reg.* v. *Reeves*,[4] *Rex* v. *Wakeman*,[5] *Reg.* v. *Jackson*[6] and *Rex* v. *Price*,[7] show that the statements in Kenny's Outlines of Criminal Law, 17th ed., p. 255, para. 245, and Russell on Crime, 11th ed., p. 1095, are correct. Fraudulent conversion is fraudulent conduct which shows that the defendant asserts the right to pass the title to goods. It is sufficient if the bailee claims the right to sell. There is no merit in the defendant's point, for he has been charged with attempted stealing and has been acquitted because he had committed the full offence. If a man is acquitted of an attempt, he cannot be convicted of the full offence. On the facts here, the magistrate was entitled to come to the decision which he did, if not for the same reasons.

Jennings in reply. The defendant relies on the authorities to show that the full offence has been committed. "Fraudulently" in section 1 (1) of the Larceny Act, 1916, is intended to add something to the phrase "converts . . . to his own use" and means that the taking must be intentional. There is nothing to show that conversion should be given any meaning other than that which it has been given in civil cases, except by the addition of the word "fraudulently." In *Price*[7] reference was made to the tort of conversion; the decision in that case, however, can be distinguished from the present case because there there had been a completion; there was no question but that that was an effective sale. It is true that if a bailee has an intent to steal he can be found guilty of larceny, but there has to be a complete actus reus also. In the present case there has been no actus reus which would satisfy the definition of larceny. Nothing has been

[4] (1859) 5 Jur.N.S. 716.

[5] (1912) 8 Cr.App.R. 18.

[6] 9 Cox C.C. 505.

[7] (1913) 9 Cr.App.R. 15.

lost to the owner. It may be that *Price* [7] takes the crime of conversion outside the definition of the civil tort, but, except for a case where there is a complete sale, the cases have followed the civil definition. [Reference was made to *Reg.* v. *Williams*.[8]]

Cur. adv. vult.

May 17. LORD PARKER C.J. Donovan J. will give the first judgment.

DONOVAN J. This is an appeal by way of case stated from a decision of Alderman Sir Seymour Howard sitting at Guildhall, London.

The prosecutor, a constable in the City of London Police, preferred a charge against the defendant of attempting to steal a tape recorder, valued at £54-odd, on June 19 last at a car park in the City of London. The recorder in question belonged to F. R. Kelly, and was the subject of a hire-purchase agreement between Kelly and one Wayment. At the time of the alleged offence the recorder was in the possession of the defendant, it having been lent to him by one White. How White came to possess it the case does not explain. It simply says that White at one time shared a flat with Wayment. One must assume for the purpose of this case that White had lawfully obtained possession and had lawfully lent the recorder to the respondent. The latter thus became a bailee of the article.

On June 19 the prosecutor, having received certain information, met the defendant by arrangement, and went with him to a car park in Warwick Lane. There the defendant produced the recorder, demonstrated it, and offered to sell it to the prosecutor for £35. The prosecutor then disclosed that he was a police officer and arrested the defendant.

At the hearing of the charge the defendant contended that at the time of the attempted sale there had already been asportation of the recorder, and therefore the full offence of larceny had been committed. Accordingly, he could not be convicted of the crime actually charged, namely, an attempt to steal. The prosecutor, on the other hand, said that the case was one of attempted conversion by a bailee which was incomplete because the sale was not concluded; the defendant was therefore properly charged with attempted larceny.

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[7] 9 Cr.App.R. 15.

[8] [1953] 1 Q.B. 660; [1953] 1 W.L.R. 937; [1953] 1 All E.R. 1068; 37 Cr.App.R. 71.

The magistrate found that at the time of the attempted sale the defendant had already stolen the tape recorder, and he was therefore not guilty of a mere attempt. No reasons are given in the case for the conclusion that the recorder had already been stolen at the time of the attempted sale.

The proviso to section 1 (1) of the Larceny Act, 1916, reproducing with immaterial modifications section 4 of the Punishment of Frauds Act, 1857, enacts that: " . . . a person may be guilty of "stealing any such thing notwithstanding that he has lawful "possession thereof, if, being a bailee or part owner thereof, he "fraudulently converts the same to his own use or the use of "any person other than the owner."

It is contended by the prosecutor that there was no such fraudulent conversion in the present case, but simply an attempt at it, because in the events which happened the true owner was deprived of nothing, and, as in the case of the civil tort of conversion, some detriment to the owner is essential to the commission of the wrong. I think the proposition is doubtful and the analogy in any event misleading. Conversion per se has been defined in a civil action as an act intentionally done inconsistent with the owner's right: see Lord Porter's speech in *Caxton Publishing Co.* v. *Sutherland Publishing Co.*[1] The analogy is misleading because no civil action is possible unless the true owner has suffered damage; but this is not so in the case of a criminal prosecution for fraudulent conversion. One cannot, therefore, determine for the purpose of the criminal law whether there has been a conversion simply by asking whether the true owner has suffered damage. He might, indeed, recover the article intact, but this would not of itself prevent a prosecution of the dishonest bailee.

The defendant contends that there was a fraudulent conversion here when he, having dishonestly assumed to himself the rights of ownership in the property, endeavoured to exercise it by offering the property for sale.

There appears to be no reported judicial decision directly in point. In *Reg.* v. *Jackson*[2] the prisoner, who borrowed a coat for one day and was later found with it on board a ship bound for Australia, was held not to have converted the coat to his own use. For this to have happened, said Martin B.,[2] there must be some act inconsistent with the purpose of the bailment, and he took the view that there was no evidence of such an act in the case.

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[1] [1939] A.C. 178, 202; 55 T.L.R. 123; [1938] 4 All E.R. 389.

[2] (1864) 9 Cox C.C. 505.

The purpose of the bailment was, presumably, that the bailee might wear the coat, and the judge was apparently of opinion that having the coat on board the ship was not sufficient evidence of conversion.

In *Reg.* v. *Reeves*[3] the prosecutor, who was lying tipsy on the ground, saw the prisoner, a friend of his, remove his, the prosecutor's, watch from his pocket. He made no protest, thinking the prisoner was doing it from friendly motives. The prisoner then went and offered the watch for sale, but afterwards denied having taken it. It was held that on those facts there was a bailment of the watch and evidence for the jury of a fraudulent conversion within the meaning of section 4 of the Punishment of Frauds Act, 1857. The jury, however, acquitted the prisoner. But for the denial of ever having taken the watch, the case is very like the present.

In *Rex* v. *Wakeman*[4] it was said by this court that a refusal to return to the owner on demand by him the thing bailed might be evidence of fraudulent conversion; and in *Rex* v. *Price*,[5] where a pony was sold by a man who had simply hired it, Avory J.[6] said that such a sale prima facie constituted conversion.

So far as the textbooks are concerned, Kenny's Outlines of Criminal Law, 17th ed., p. 255, para. 245, contains this passage: "Exactly what constitutes the 'conversion,' which involves the "bailee in the guilt of stealing, has not been authoritatively "stated. The prisoner must have possession of the goods, other-"wise he would not be bailee, and then, as it would seem, any "conduct on his part which shows that he assumes either the "full title of ownership in the goods, or asserts a right to pass "the full title of ownership, will amount to such conversion as will "render him guilty of stealing them within the statute." Russell on Crime, 11th ed., p. 1095, by the same author, has this to say upon the subject: "It is unfortunate that the term 'conversion' "does not appear to have been given a precise definition either "judicially or in the textbooks. But for the purposes of the law "of larceny it is submitted that it is necessary that the offender "should have possession of the goods, and that when possession "has been obtained any setting up by the offender of a full title "to the property in himself, adverse to that of the owner, if done "without a bona fide claim of right, will render him guilty of "larceny."

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[3] (1859) 5 Jur.N.S. 716.

[4] (1912) 8 Cr.App.R. 18, C.C.A.

[5] (1913) 9 Cr.App.R. 15, C.C.A.

[6] Ibid. 17.

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Donovan J

It would be rash, I think, to attempt a definition of the term "converts . . . to his own use" which would cover every possible case. A sale of the property by the bailee, contrary to the terms of the bailment, and for his own benefit, is clearly such a conversion. The reason is that the bailee in such a case has usurped the rights of the owner for his, the bailee's, benefit. Is the position any different in the case of an attempted sale? I think not. If I am lent property, and then determine in my own mind to sell it for my own benefit contrary to the terms of the bailment, I have determined that in relation to the property I will no longer be a borrower but an owner, and an owner who wishes to sell. When I proceed to carry that intention into effect by offering the property for sale, I am standing in the owner's shoes in relation to that property and exercising an owner's right. In these circumstances I have, in my view, already converted the property to my own use whether the attempted sale takes place or not; and if I have acted dishonestly in the matter, as the defendant here is found to have done, then the offence of larceny is committed. In short, I agree with the author of Kenny and Russell in his view upon this point.

It is a little strange, perhaps, if the defendant should succeed on the grounds that he has committed the full offence and not merely attempted it, and it is said for him that in these circumstances he cannot be tried for the full offence. I express no opinion upon that. The point is not raised in the case, and may yet arise for decision. In the meantime I would dismiss this appeal.

DAVIES J. I entirely agree with the judgment which my Lord has just delivered.

LORD PARKER C.J. I agree.

Appeal dismissed.

Solicitors: *The Comptroller and City Solicitor; Arthur W. Kemp.*

C. J. E.

C. C. A.

1959
Dec. 7.

Lord Parker C.J., Hilbery and Salmon JJ.

REGINA *v.* SHACTER.

Company — Auditor — Whether "officer" of company — "Officer" — "Public officer"—Larceny Act, 1861 (24 *&* 25 *Vict. c.* 96), *ss.* 83, 84—*Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 159, 328 (1) (*j*), 330 (*a*), 331, 333.

In 1953, the appellant was appointed auditor of a company and his appointment was continued from year to year thereafter. He was convicted as a "public officer" of a public company of falsifying the books of the company and publishing fraudulent statements contrary to sections 83 and 84 of the Larceny Act, 1861, and, being "an officer" of the company, of making false entries, fraud and defaults contrary to sections 328 (1) (*j*), 330 and 331 of the Companies Act, 1948. On appeal on the ground that, at the material time the appellant was not an "officer" of the company:—

Held, that an auditor appointed to fill an office of a company was an officer, whereas an auditor appointed ad hoc for a limited purpose was not, and that the appellant was an "officer" of the company, and a "public officer" within the meaning of the Companies Act, 1948, and the Larceny Act, 1861, respectively.

In re London and General Bank [1895] 2 Ch. 166; 11 T.L.R. 374; *In re Kingston Cotton Mill Co.* [1896] 1 Ch. 6; 12 T.L.R. 21, 60, 123, 430; *In re Western Counties Steam Bakeries and Milling Co.* [1897] 1 Ch. 617; 13 T.L.R. 170, 276 applied.

APPEAL against conviction.

The appellant, Norman Shacter, was convicted at Manchester Assizes together with one Maurice Shalam on eight counts in respect of offences committed as an officer of a company, Maurice Shalam & Co. Ltd. Two of the counts, under section 84 of the Larceny Act, 1861, alleged the publishing of fraudulent statements as a public officer of a public company, and a further count under section 83 of that Act alleged falsifying books as such an officer. Three counts under section 330 (*a*) of the Companies Act, 1948, alleged fraud by an officer of a company. A count under section 331 of the Act of 1948 alleged default as an officer of a company that was wound up in keeping accounts, and the final count under section 328 (1) (*j*) of the Act of 1948 alleged the making, as an officer of a company, of a false entry in a paper relating to the affairs of a company subsequently ordered to be wound up by the court.

In 1950 Shalam formed a private company to carry on a family business and the appellant was appointed auditor, he being

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[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

also appointed auditor of another company formed by Shalam, the Wellington New Mills (Blackburn) Co. Ltd. The appellant was first appointed on June 22, 1953, at an annual general meeting of the company, and his appointment was continued year by year thereafter. The companies, or one of them, got into financial difficulties and ultimately, with a view to obtaining an overdraft from a bank, certain figures were put before the bank including the stock position, and all the charges against the appellant related to the putting forward of those figures to the bank.

At the trial, Thesiger J. directed the jury in his summing-up in these words: "There is no dispute that Mr. Maurice Shalam "was a director of the company, and I direct you as a matter of "law that if Mr. Shacter was appointed auditor, and was exer- "cising the office of auditor in 1953—and that fact does not seem "to be in dispute—then he would be an officer of the company. "That is a point of law on which I have to take the responsibility "of deciding."

The appellant was found guilty on all counts and was sentenced to a total of nine months' imprisonment and ordered to pay £100 towards the costs of the prosecution. He appealed mainly on the ground that he was not an "officer" of the company within the meaning of the Acts.

Christmas Humphreys Q.C. and *A. K. Hollings* for the appellant. The indictment alleged that the appellant was an officer of a limited company. An auditor is not as such an officer of a company, though one may have to decide each case on its own facts: see *Findlay* v. *Waddell*.[1] Thesiger J. was wrong in his direction to the jury on this point. There may, of course, be cases where an auditor is made an officer by the memorandum of association. Section 455 of the Companies Act, 1948, says that "'officer,' in relation to a body corporate, includes a director, "manager or secretary"; it does not include an auditor. By section 328 (3) of the Act "the expression 'officer' shall include "any person in accordance with whose directions or instructions "the directors have been accustomed to act"; this must be a question of fact. It is not reasonable, and certainly not necessary, to regard an auditor as an officer of a company. He safeguards the shareholders, but takes no part in the running of the company, and is more in the position of an inspector to see that the company is properly run. The textbook writers are divided: see Gower's Principles of Modern Company Law, 2nd ed., p. 429.

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[1] 1910 S.C. 670.

There is no English case which decides that the penal sections of the Companies Act, 1948, such as sections 155 and 156, make it necessary to hold an auditor to be an officer of a company. The reference in section 159 of the Act of 1948 to the appointment of an auditor " to hold office " does not mean that an auditor so appointed is an officer. The phrase " hold office " might be equally applied to the librarian or solicitor. If an auditor is an officer, why is the word " auditor " omitted from the definition of " officer " in section 455? and why is a distinction made between officer and auditor in other sections such as 155 and 156 (3)?

[SALMON J. How can an auditor become an officer of a company?]

By appointment under the memorandum and articles of association. The whole point of an auditor is to be objective, to stand apart from the running of the company. Section 57 of the Finance Act, 1940, draws a distinction between an officer and an auditor, and section 59 shows that an auditor is not an officer for the purposes of that Act. There is no distinction between the position with regard to a public officer under the Larceny Act, 1861, and an officer under the Companies Act, 1948.

In *In re London and General Bank*,[2] a case under section 7 of the Companies Act, 1879, the articles of association made the auditor an officer. That case, and also *In re Liberator Permanent Benefit Building Society*,[3] *In re Kingston Cotton Mill Co.*[4] and *In re Western Counties Steam Bakeries and Milling Co.*[5] all dealt with questions of civil liability. There is no case of the criminal interpretation of an Act holding an auditor to be an officer of a company. The sections concerned being penal sections must be strictly construed.

Fenton Atkinson Q.C. and *Philip Kershaw* for the Crown. The cases of *In re London and General Bank*,[6] *In re Kingston Cotton Mill Co.*[7] and *In re Western Counties Steam Bakeries and Milling Co.*[8] cover the position. See Buckley's Company Law, 13th ed., p. 678. From section 161 (2) of the Act of 1948 it appears to be plain that no one other than an officer can be an auditor.

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[2] [1895] 2 Ch. 166; 11 T.L.R. 374.

[3] (1894) 10 T.L.R. 537; 71 L.T. 406.

[4] [1896] 1 Ch. 6; 12 T.L.R. 21, 60, 123, 430.

[5] [1897] 1 Ch. 617; 13 T.L.R. 170, 276.

[6] [1895] 2 Ch. 166.

[7] [1896] 1 Ch. 6.

[8] [1897] 1 Ch. 617.

Three sections at least, sections 167 (5), 205 and 448 (1) of the Act of 1948 contemplate that an auditor may be an officer. By section 159 (6) of the Act the directors may fill any casual vacancy in the office of auditor. Once an auditor has been appointed at a general meeting he becomes an officer. He is appointed to the office of auditor. In *Rex* v. *Whitaker*,[9] Lawrence J. said [10]: "A public officer is an officer who discharges "any duty in the discharge of which the public are interested."

Humphreys Q.C. in reply. It is not a necessary finding under the Act of 1948 that an auditor is an officer. He may be made so by the articles. There cannot now be an ad hoc auditor.

LORD PARKER C.J., giving the judgment of the court, stated the facts and continued: In all the counts under the Companies Act, 1948, the offences laid were offences said to have been committed by "an officer of the company." Under the Larceny Act, 1861, the words are "by a public officer of a public com-"pany," but no one suggests that in this case at any rate the word "public" adds anything.

The first and main question which arises in this appeal is whether the appellant was at the material time an officer of the company. The argument for the appellant can be summarised as follows: An auditor prima facie is not an officer. His duty is to safeguard the shareholders and not to help the directors, and he is not concerned with the day-to-day running or internal management of the company. It would be surprising, so runs the argument, to find him treated by the legislation as an officer, and great stress is laid on the definition clause in the Companies Act, 1948, s. 455, where an officer is defined in these terms: "'officer,' in relation to a body corporate, includes a director, "manager or secretary." Observe, it is said, that no reference is made to "auditor."

That section, however, is a section of inclusive definition, and it is necessary to look more closely at the sections of the Act. The first and perhaps most relevant section is section 159, subsection (1) of which provides: "Every company shall at each "annual general meeting appoint an auditor or auditors to hold "office from the conclusion of that, until the conclusion of the "next, annual general meeting"; and in subsections (5) and (6) of that section reference is again made to auditors appointed to hold office and to the office of auditor. Pausing there, it can well be asked what office an auditor is being appointed to unless it is an office in the company, and what officer he becomes unless it be an officer of the company.

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[9] [1914] 3 K.B. 1283; 30 T.L.R. 627.

[10] [1914] 3 K.B. 1283, 1296.

Turning to section 161, it is provided, so far as it is relevant, by subsection (2): "None of the following persons shall be "qualified for appointment as auditor of a company—(*a*) an "officer or servant of the company;" and by the last sentence: "References in this subsection to an officer or servant shall be "construed as not including references to an auditor." It follows from that, first, that an auditor becomes, or at any rate may become on his appointment, an officer of the company, otherwise the last sentence I have referred to is unnecessary. Secondly, if he does become an officer of the company, it can only be by reason of being an auditor, for if he became an officer for any other reason he would under the subsection be disqualified. Further, in various sections of the Act, in particular section 167 (5), section 205 and section 448 (1), reference is made to an auditor "whether an officer of the company or not." Those passages again, at any rate, show that an auditor may be an officer of the company, and this can, as I have already said, only be by reason of his appointment as auditor. Clearly, therefore, the Act contemplates that an auditor may, at any rate, be an officer by reason of his appointment under section 159.

So far as the authorities are concerned, these are all concerned with the misfeasance section in earlier Acts dealing with civil liability, but they clearly show that an auditor appointed to fill an office is an officer, whereas an auditor appointed ad hoc for a limited purpose is not. The first case to which we were referred was *In re London and General Bank*.[1] In that case an auditor had been appointed by a banking company pursuant to section 7 of the Companies Act, 1879. Subsection (1) of that section provided, so far as is relevant, as follows: "Once at the least in every year "the accounts of every banking company . . . shall be examined by "an auditor or auditors, who shall be elected annually by the com- "pany in general meeting." By subsection (2) it was provided: "A director or officer of the company shall not be capable of being "elected auditor of such company." The court, consisting of Lindley, Lopes and Kay L.JJ., were of the opinion that the auditor was an officer of the company within the relevant misfeasance section. It is true that in that case the articles of the bank in fact defined auditors and the secretary as meaning those respective "officers" from time to time of the company. In other words, the articles, unlike the present case, were treating auditors as officers, but if one examines the judgments it is quite clear that in all three cases they are based upon the appointment, although the opinions expressed were confirmed or fortified by a reference to the articles.

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[1] [1895] 2 Ch. 166; 11 T.L.R. 374.

Again, in *In re Kingston Cotton Mill Co.*,[2] the court, again the Court of Appeal, followed the *London and General Bank* case,[3] and they did that despite the fact that there was nothing in the articles in that case corresponding to the articles in the *London and General Bank* case.[3]

Finally, in *In re Western Counties Steam Bakeries and Milling Co.*,[4] the same distinction was drawn, namely, a distinction between somebody appointed to an office who would be an officer of the company, and an auditor who was merely appointed ad hoc for some limited purpose.

It is true, as I have said, that those three cases were all dealing with questions of civil liability, but this court sees no reason to draw any distinction in a criminal case. Section 333 of the Act of 1948, which is the present misfeasance section, must be taken to have been passed, and passed in virtually the same words as in earlier Acts, with full knowledge of the decisions in those cases to which I referred. It is a section which follows closely on the sections creating criminal offences, and this court sees no reason to give any different interpretation to the word "officer" in the penal sections than in section 333.

Mr. Humphreys urged that under the present legislation there is no power to appoint an auditor except under section 159 (1) of the Act. If that be so, the words "whether an officer of "the company or not," which appear in the various sections to which I have referred, are meaningless, but, without deciding the matter, it seems to this court that the scheme of the present legislation is really to perpetuate the distinctions drawn in the cases referred to, and that it would still be possible under this legislation for the directors as opposed to the shareholders in annual general meeting to appoint, for instance, somebody as auditor for a limited purpose, it may be for a private audit. Looked at in that way, it becomes clear at once why no reference to "auditor" is specifically put in the definition section. This

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[2] [1896] 1 Ch. 6; 12 T.L.R. 21, 60, 123, 430.

[3] [1895] 2 Ch. 166.

[4] [1897] 1 Ch. 617; 13 T.L.R. 170, 276.

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court has come to the clear opinion that the appellant was, at the relevant time, an officer of the company, and that the judge's direction to the jury was correct in law.

[His Lordship then considered the remaining grounds of appeal and concluded:] Accordingly, this court, having considered the matter with some care, has come to the conclusion that there is nothing in the points raised, and therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors: *A. L. Hamwee & Co., Manchester; Solicitor, Board of Trade.*

1960
May 4.

Lord Parker C.J., Gorman and Ashworth JJ.

JOLLYE *v.* DALE.

Road Traffic—Notice of intended prosecution—Warning at "time" of offence—Warning 90 *minutes later—Dangerous driving—Meaning of "time" the offence was committed—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*a*).

The defendant, who, at 5.30 one evening, was thought by a police officer to be driving on a highway in a manner dangerous to the public, failed to stop when requested to do so and was not apprehended until half an hour later when he had driven some miles further. He was taken to a police station, suspected of being under the influence of drink, but after a medical examination was pronounced fit to drive. He was then warned, at about 7.10 p.m., that the police would consider prosecuting him for careless or dangerous driving, and that warning was repeated at 7.30 p.m. Five weeks later a summons was served on him for dangerous driving contrary to section 11 of the Road Traffic Act, 1930:—

Held, that the words "at the time the offence was committed" in section 21 (*a*) of the Act of 1930 [1] must be looked at in a general way, and their meaning could not be limited to the exact point of time at which the offence was committed. Whether or not a warning had been given at the time of the offence was a question of degree in every case and therefore of fact, and on the facts, it had been given within such time as could be said to be "at the time the offence was "committed." Accordingly, the terms of section 21 had been complied with and the appeal would be dismissed.

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[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an "offence under any of the provisions "of this Part of this Act relating . . . "to . . . dangerous driving . . . he "shall not be convicted unless either— "(*a*) he was warned at the time the "offence was committed that the "question of prosecuting him for an "offence . . . would be taken into con-"sideration; . . ."

Per Lord Parker C.J. For my part, I have some difficulty in saying that the test is whether the warning was given as soon as reasonably possible, because one can envisage cases, in particular where the police have had to pursue an alleged offender for a long distance, when the earliest opportunity of giving the warning may be hours later, and at a point many miles distant. I do not think that a warning given after such a lapse of time and after the vehicles had travelled a long distance could, in any proper sense, be said to be given at the time the offence was committed.

Jeffs v. *Wells* (1936) 100 J.P.(N.) 406 considered.

CASE STATED by Dacorum (Hertford) justices sitting at Hemel Hempstead.

On April 29, 1959, an information was preferred by the prosecutor, Police Constable Frank Dale, against the defendant, Leonard Frederick Jollye, alleging that he, on April 6, 1959, at Berkhamsted, Hertfordshire, did drive a motor-car on a road, namely, the High Street, in a manner which was dangerous to the public contrary to section 11 of the Road Traffic Act, 1930, as amended by section 26 of the Road Traffic Act, 1956.

The justices heard the information on June 3, 1959, and found the following facts: A police constable stationed at Berkhamsted saw the defendant driving his Rover motor-car in the High Street on the day in question at about 5.30 p.m. At the traffic lights near the junction of the High Street and King's Road he raised his left arm indicating that he wished the defendant to stop, but he did not do so. The police constable with other officers later followed the defendant's car, which was stopped at Hemel Hempstead at 6 p.m., and the defendant was apprehended. Suspecting that he was under the influence of drink the police officers took the defendant to Hemel Hempstead police station, arriving there at 6.10 p.m. The defendant, at about 7 p.m., was examined by a doctor who certified that he was fit to drive. After the medical examination and between 7 and 7.15 p.m. the defendant was warned by the police constable (the prosecutor) in the presence of two other police officers that he was reporting him for the question to be considered of prosecuting him for one or more of the following offences, reckless, careless or dangerous driving. The defendant replied that he did not see the officer until he was eventually stopped. At about 7.30 p.m. the defendant returned to his car, where he was again warned that the question of prosecuting him would be considered. Apart from those two warnings no notice of intended prosecution was given to him. The information and summons was not served upon him until May 12, 1959.

It was contended for the defendant that the warnings given to him by the prosecutor did not comply with the requirements of section 21 of the Road Traffic Act, 1930, in that he was not warned "at the time the offence was committed" that the question of prosecuting him would be taken into consideration, the first warning not having been given until after 7 p.m., whereas the alleged offence was committed at or about 5.30 p.m., and he having been apprehended at 6 p.m.

It was contended by the prosecutor that the warning or warnings given to the defendant did comply with the requirements of section 21 as they were given as soon as the police reasonably could be expected to give them after the commission of the alleged offence.

The justices found that the earliest opportunity at which a warning could possibly have been given to the defendant was when he was stopped at 6 p.m. at Hemel Hempstead; they were of opinion that the first warning given at the police station did comply with the requirements of section 21 as it was given at the earliest time reasonably possible after the alleged offence; that the prosecutor had acted correctly in not administering a warning to the defendant when he was apprehended at 6 p.m. as he, the prosecutor, was of the opinion that the defendant was under the influence of alcohol. They accordingly heard the case, found the defendant guilty of dangerous driving, fined him £20 with £7 7s. costs, and disqualified him from driving for six months. The defendant appealed.

The question stated by the justices for the opinion of the court was whether the warnings given by the police did comply with the requirements of section 21.

David Lloyd for the defendant. The oral warning purporting to have been given pursuant to section 21 (*a*) was not given until one and a half hours after the time when the offence was alleged to have been committed, and was given at a police station some miles from the place of the alleged offence. No notice of prosecution pursuant to section 21 (*c*) was served. The justices were wrong in holding that the provisions of section 21 had been complied with. It is conceded that the words "at the time the offence was "committed" in section 21 (*a*) cannot be taken literally, because it is only in the most exceptional cases that a warning can be given at once. That must have been in the mind of the court in *Jeffs*

v. *Wells*,[2] where a warning given 35 minutes after an offence and while the parties were still on the scene of the accident was held to comply with section 21 (*a*), as it was given at the earliest time reasonably possible. But the decision in that case might have been different if the defendant had not still been at the scene of the accident at the time the warning was given. It is submitted that under section 21 (*a*), unlike paragraph (*c*), the legislature contemplated that the warning is to be given at the place where the offence is alleged to have been committed as soon as the police arrive.

[Lord Parker C.J. referred to *Jeffs* v. *Wells*.[2] I do not see how " the earliest time reasonably possible " can be the proper test to apply.]

E. A. Machin for the prosecutor. To succeed, the defendant must satisfy the court that the finding of fact of the justices was a perverse finding. Paragraph (*a*) of section 21 cannot be construed literally, but there is nothing in its words to say where the warning is to be given. To say that it must be given at the place where the offence was committed the court would have to read words into the statute. The purpose of section 21 is to ensure that the defendant is given a proper opportunity to collect his defence while the events are still in his mind. In the present case the defendant was given that opportunity and he has not been prejudiced by the fact that the warning was given to him at the police station some time after the offence was committed. One of the issues here was whether it would have been reasonably possible to give him the warning any earlier because, in the opinion of the police, had it been administered earlier it would have been given to a man thought possibly to be under the influence of drink. In considering whether there was any failure to comply with the provisions of section 21 (*a*), the proviso to section 21 is relevant, because the conduct of the defendant in relation to drink must be taken into consideration. There is authority for the proposition that a warning given to a man not able to appreciate it is not a proper warning within the meaning of section 21 (*a*).

As to the test applied by Avory J. in *Jeffs* v. *Wells*,[2] it is submitted that the words " at the time the offence was committed " in section 21 (*a*) cannot be struck out and the words of Avory J. substituted. It may be that the words of paragraph (*a*) must be given a somewhat liberal meaning, but the purpose of section 21 must be borne in mind. Whether or not the warning was given at the time the offence was committed is a question of fact for the justices, and if their finding was not perverse it should not be disturbed.

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[2] (1936) 100 J.P.(N.) 406.

LORD PARKER C.J. This is an appeal by way of case stated by justices for the county of Hertfordshire sitting at Hemel Hempstead, before whom an information was preferred by the prosecutor against the defendant that he, on April 6, 1959, did drive a motor-car in a manner dangerous to the public having regard to all the circumstances of the case.

The point raised by way of defence in the first instance was that the provisions of section 21 of the Road Traffic Act, 1930, in regard to warnings had not been complied with. That argument did not succeed before the justices. They held that a proper warning had been given. They then proceeded to hear the case, found the defendant guilty, fined him £20, ordered him to pay £7 7s. costs, and disqualified him from driving for six months.

The sole question in this appeal is whether the justices were right in holding that the provisions of section 21 of the Road Traffic Act, 1930, had been complied with. [His Lordship stated the facts and continued:]

Section 21, which has given rise to a number of difficulties, provides, so far as it is material to this case: "Where a person "is prosecuted for an offence . . . of . . . dangerous driving," as this man was, "he shall not be convicted unless either—(*a*) he was "warned at the time the offence was committed that the question "of prosecuting him . . . would be taken into consideration; or . . . "(*c*) within . . . fourteen days a notice of the intended prosecution "specifying the nature of the alleged offence and the time and "place where it is alleged to have been committed was served on "or sent by registered post to him or the person registered as the "owner of the vehicle at the time of the commission of the "offence: . . ." I only refer to sub-paragraph (*c*) in order to say that the police took no action under that paragraph at all. The sole question is whether they gave a warning "at the time the offence "was committed."

What is said here on behalf of the defendant is that a warning given an hour and a half after the commission of the offence at a place some miles away from the place of the offence cannot be said to have been given at the time of the offence.

It is not altogether easy to lay down any definition of what is meant by the words "at the time the offence was committed."

It cannot mean the exact moment when the offence is committed because the occasions when it would be possible to give a warning at that time would be very, very rare indeed. It seems to me that the expression "at the time the offence was committed" must be looked at in a general way, and that it is not limited to the point of time when the offence was committed. Support for that view is gained from the only case which has come before this court on this point, *Jeffs* v. *Wells* in 1936.[1] In that case it appeared that the defendant had driven into the back of another stationary car at 11.45 a.m. and no policeman was present. The police were sent for and arrived half an hour later. The police took statements, and at 12.20 p.m., 35 minutes later, gave an oral warning. The magistrates said that that was not given at the time of the offence. This court said that it was. The contention in that case was that the warning was good because it had been given at the earliest time reasonably possible after the arrival of the police and while the defendant and the vehicles concerned were still at the scene of the alleged offence. Lord Hewart C.J. said[2]: "We are clearly of opinion that this "appeal must be allowed. It is impossible for the words of the "statute to mean that the warning shall be given at the very "moment of the collision or at the next moment after it. I think "that every one of the contentions of the appellant was sound, and "that the justices were wrong in point of law." Avory J., agreeing, said[3]: "I am not sure whether the justices, although "I am anxious to do justice to their view, thought that in this "particular case 35 minutes was too long after the offence was "committed. In any view, it seems that the warning was given "at the earliest time reasonably possible after the arrival of the "police and while the parties were still at the scene of the "accident."

For my part, I have some difficulty in saying that the test is whether the warning was given as soon as reasonably possible, because one can envisage cases, in particular where the police have to pursue an alleged offender for a long distance, when the earliest opportunity might be hours later, and at a point many miles distant. I do not think that a warning given after such a lapse of time and after the vehicles had travelled a long distance could, in any proper sense, be said to be given at the time the offence was committed. At the same time, *Jeffs* v. *Wells*[4] is authority for this, that in every case it is a question of degree, and therefore a question of fact; and if it be a question of fact, it is not a matter with which this court can interfere provided always that there is evidence which would support the finding. Here, the justices have found—it is true using the test "as soon as reasonably "possible"—that this warning was given at the time the offence was committed. The evidence which led them to come to that conclusion was that the police did not catch up with the defendant until 6 p.m., half an hour later; that at that time he appeared to be under the influence of drink; that it would have been quite incorrect for the police to have warned him then, and that they did warn him as soon as the doctor certified that he was fit to drive a car. For my part, I think that there is a finding with which this court cannot interfere. It is said that that was the first time when it was reasonably possible to give the warning. Even if that is not the true test, the warning was at any rate given within such a time which, on the facts of this case, can be said to be at the time of the offence, and on those grounds I would dismiss this appeal.

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[1] (1936) 100 J.P.(N.) 406.

[2] Ibid.

[3] Ibid.

[4] Ibid.

An argument was addressed to the court on the proviso to section 21, and in particular it was said that in the present case the defendant by his own conduct had contributed to the failure of the police to comply with the requirement of section 21 (*a*). Having come to the conclusion that the requirement was satisfied, I find it unnecessary to consider the proviso, although as at present advised I do not think it has any application to this case.

Gorman J. I agree.

Ashworth J. I also agree.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co.; Ottaways, St. Albans.*

E. M. W.

LONGHURST *v.* GUILDFORD, GODALMING AND DISTRICT WATER BOARD.

1959
Nov. 19, 20, 27.

Lord Parker C.J.

[1958 L. 764.]

Factory—Definition—Pumping station—"Altering" or "cleaning" an article—Water—Whether an "article"—Whether pumping station a "factory"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1), (6), (9).

The plaintiff was employed by the defendants at one of their pumping stations. In the course of his employment he was injured when his right hand was caught in the transmission machinery of a pump house at the station. The purpose of the pump house was to put the water under pressure after it had been filtered in the filter house. The plaintiff brought this action for damages, alleging negligence at common law and breaches of statutory duty under section 13 of the Factories Act, 1937:—

Held, (1) that water could be an "article" within the meaning of section 151 (1) of the Factories Act, 1937.

Ferens v. *O'Brien* (1883) 11 Q.B.D. 21 and *Cox* v. *S. Cutler & Sons Ltd.* [1948] W.N. 345; [1948] 2 All E.R. 665 applied.

(2) That the process of filtering the water in the filter house of the station was the altering or cleaning of an article within the meaning of that section.

Wiltshire County Valuation Committee v. *London Co-operative Society Ltd.,* 66 T.L.R. (Pt. 1) 1016; [1950] 1 All E.R. 937 distinguished.

(3) But that the putting of water under pressure in the pump house was not an altering of water or an adapting for sale of water and, being something other than one of the processes for or incidental to what was carried on in the filter house, the pump house was not, and did not form part of, a factory within the meaning of the Act. Accordingly, there being no common law negligence, the plaintiff's claim failed.

Thurogood v. *Van Den Berghs and Jurgens Ltd.* [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682 distinguished.

ACTION.

The plaintiff, Nicholas Alexander Irwin Longhurst, was employed by the defendants as an engine driver at their pumping station at Hambledon in Surrey. On February 1, 1958, fairly early in the afternoon, the plaintiff met with a serious accident when he got his right hand caught in the bite formed by a belt and pulley, and as a result the whole of his right arm had to be amputated just below the shoulder. At the time of the accident,

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[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

the plaintiff was in charge of the station, and had worked there for some seven years, and for a long time before that he had been working at other stations. The station at Hambledon consisted of a fenced-in area of some 64 acres, in which water was collected from springs and brought down to a filter house. The water came by gravity to the filter house, passing through filters to extract any foreign matter, and from there it went down to a large concrete tank, which extended under the filter house and also under the whole or part of the intervening space between the filter house and another house called the pump house. On the way to the concrete tank from the filters it received some chlorine solution in order to chlorinate the water, which solution was fully disseminated in the water in the tank. Apart from the filters and the chlorination plant, there was only a small Petter engine used for cleaning the filters in the filter house. In the pump house there was one large engine and pump and two smaller engines and pumps which took the water out of the concrete tank, put it under pressure and forced it along the mains. Part of the water put under pressure went to a reservoir which was at a higher level and from which it fell by gravity to feed the houses in the district, and part of it went direct through the mains also to houses in the district. The floor of the pump house consisted partly of concrete and partly of quarry tiles round the pumps.

The accident probably occurred between 2 p.m. and about 4.30 p.m. on the afternoon of Saturday, February 1, 1958, when the plaintiff was in charge of the station. The plaintiff was found some time after 8 p.m. on that day hanging over some guard rails by a machine in the pump house, almost unconscious, although he was muttering complaints about his back. His right hand was found completely mangled, as if it had gone into the bite of the belt and pulley. There was blood on the floor and the plaintiff was found to be wearing a gauntlet glove on his left hand, and the glove which at some time had been on his right hand was lying on the ground under the pulley showing marks of having been through the bite.

The vital point of the machine for the purposes of the case was the bite between a pulley consisting of five rather sharp edges with grooves in between and the belt, which was really four belts joined together and which ran in the grooves of the pulley. There were guard rails about 3 feet high. At the position opposite the bite formed by the belt and pulley, the top guard was horizontally about 13 inches from the edge on the side of the pulley, and in the vertical it was about 6½ inches above. The plaintiff, when he was found, had both arms over the top guard rail and was standing square to the pulley, his right arm being caught and kept by the rotation of the pulley between the side of the pulley and the bearing.

The plaintiff brought this action against the defendants for damages in respect of his injuries, alleging that the defendants were in breach of the duty owed by master to servant at common law and further, or alternatively, for their breach of statutory duty under section 13 of the Factories Act, 1937.[1] It was alleged by the plaintiff that the pumping station was a factory within the meaning of the Factories Act, 1937, as defined in section 151 (1), (6), (9) of that Act.

The defendants denied that they had been guilty of negligence or breach of statutory duty.

Glynn Blackledge Q.C. and *Peter Perrins* for the plaintiff. In considering whether the pump house was a factory, one must consider its main purpose. In the case of a public authority, one must look at the Act under which it derives its powers in order to ascertain its functions. By section 35 of the Waterworks Clauses Act, 1847, and the effect of sections 31 and 39 of the Third Schedule of the Water Act, 1945, the defendants as undertakers were under a duty to provide and lay on constantly at a pressure defined by statute, a supply of pure and wholesome water, sufficient for the domestic purposes of all owners and occupiers of premises within the limits of supply. The whole

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[1] Factories Act, 1937, s. 13 (1): "Every part of the transmission "machinery shall be securely fenced "unless it is in such a position or of "such construction as to be as safe "to every person employed or working "on the premises as it would be if "securely fenced."

S. 151 (1): "Subject to the pro"visions of this section, the expression "'factory' means any premises in "which, or within the close or cur"tilage or precincts of which, persons "are employed in manual labour in "any process for or incidental to any "of the following purposes, namely:— ". . . (b) the altering, . . . clean"ing . . . of any article; or (c) the "adapting for sale of any article; "being premises in which, or within "the close or curtilage or precincts of "which, the work is carried on by "way of trade or for purposes of gain "and to or over which the employer "of the persons employed therein has "the right of access or control: . . . "(6) Where a place situate within the "close, curtilage, or precincts forming "a factory is solely used for some "purpose other than the processes "carried on in the factory, that place "shall not be deemed to form part "of the factory for the purposes of "this Act, but shall, if otherwise it "would be a factory, be deemed to be "a separate factory. . . . (9) Any "premises belonging to or in the "occupation of . . . any . . . public "authority shall not be deemed not "to be a factory, . . . by reason only "that the work carried on thereat is "not carried on by way of trade or for "purposes of gain."

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purpose of the building and the whole statutory duty was to supply such water under such pressure from the building. In *Wiltshire County Valuation Committee* v. *London Co-operative Society Ltd.*,[2] where the premises were held not to be a factory, the milk was clearly drinkable in the first place. Here the water was not potable.

Ferens v. *O'Brien*[3] decided that water supplied by a water company to a consumer, and standing in his pipes, may be the subject of a larceny at common law. [Reference was also made to *Thurogood* v. *Van Den Berghs and Jurgens Ltd.*[4]]

It is submitted that this was a factory: see section 151 (1) of the Factories Act, 1937. There was clearly the altering of an article or its cleaning.

[LORD PARKER C.J. Was there an adapting for sale?]

The question is whether, when the statutory authority supplies water, it is a service or a sale. It is submitted that it is a sale: see the statutory definition of larceny in section 1 of the Larceny Act, 1916. [Reference was made to *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners*[5] and *Read* v. *Croydon Corporation.*[6]] The water when it arrives at the station is not treated as wholesome. It leaves the station not only wholesome but disinfected and at pressure. It is all one operation. The fact that the processes are geographically performed in different buildings is irrelevant. If the buildings are a factory in any part, then the question is whether the pump house, which is clearly within the curtilage of the premises, is used "for "or incidental to" the main purposes of the factory: see *Thurogood* v. *Van Den Berghs and Jurgens Ltd.*[7] As to whether putting pressure on the water brings the pump house within the Factories Act, see *Hoare* v. *Truman, Hanbury, Buxton & Co.*[8] There is an alteration of the water.

F. W. Beney Q.C. and *E. W. Eveleigh* for the defendants. By section 151 (6) of the Factories Act, 1937, "Where a place "situate within the close, curtilage, or precincts forming a fac- "tory is solely used for some purpose other than the processes "carried on in the factory, that place shall not be deemed to "form part of the factory." There is no decision of the courts that a waterworks is a factory. As to whether water is an article, there is authority that gas is an article: see *Cox* v. *S. Cutler & Sons Ltd.*[9] But coal gas is derived from coal, whereas water is a natural element.

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[2] 66 T.L.R. (Pt. 1) 1016; [1950] 1 All E.R. 937.

[3] (1883) 11 Q.B.D. 21.

[4] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[5] (1882) 7 App.Cas. 694.

[6] 55 T.L.R. 412; [1938] 4 All E.R. 631.

[7] [1951] 2 K.B. 537, 545.

[8] (1902) 71 L.J.K.B. 380; 18 T.L.R. 349.

In *Wiltshire County Valuation Committee* v. *London Co-operative Society Ltd.*[10] the process of cleaning milk was held not to be adapting an article for sale within the meaning of "factory." The test applied in *Sedgwick* v. *Watney, Combe, Reid & Co.*[11] was whether there was any change carried out in the article. In the present case all that took place in the pump house was concerned with distribution.

The pump house, therefore, was not, and did not form part of, a factory within the meaning of the Act. If this submission is wrong, the accident that occurred here was one that was quite unforeseeable by anyone in authority, and there was no proved breach of statutory duty: see *Burns* v. *Joseph Terry & Sons Ltd.*[12]

Lord Parker C.J., having stated the facts, said that he was satisfied that the plaintiff remembered very little of what happened, and that he (his Lordship) was quite unable to make any findings as to the exact circumstances in which the accident occurred and could find no breach of common law duty. He continued: The position does not end there, however, because there is the alternative claim of breach of statutory duty under the Factories Act. The first question that arises is whether this pumping station or any part of it was a factory. As to that there is little authority and it is, perhaps, significant that there is no case in which a water works or a pumping station has been held to be a factory. Indeed, if I understand the evidence aright, it is the general view of all public authorities who carry out the duties of supplying water that such premises as these are not factories. The relevant statutory provisions are, of course, section 151 (1), (6) and (9). [His Lordship read section 151 (9) and (1), and continued:] This being a public authority, by reason of subsection (9) I am not concerned with the question of trade or gain. It is also conceded that this plaintiff was engaged in manual labour. Accordingly, the only provision that I have to consider is whether in any part of the precincts there was a process for or

[9] [1948] 2 All E.R. 665.

[10] 66 T.L.R. (Pt. 1) 1016; [1950] 1 All E.R. 937.

[11] [1931] A.C. 447; 47 T.L.R. 308.

[12] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.

incidental to the altering or cleaning of any article, or the adapting for sale of any article. Those are the only words which could possibly, I think, apply.

The first question, therefore, is whether water can come under the description of "article." As I have said, it has apparently always been assumed that it does not. But, at the same time, I do not quite know what meaning one could fairly give to "article" which would cut out water. It is no good saying: "Oh, but "water is a natural element"; there are clearly plenty of natural elements which undoubtedly would be articles. It has been held in *Ferens* v. *O'Brien* [1] that water may be the subject of a larceny at common law. Reference was also made to water in *Cox* v. *S. Cutler & Sons Ltd.*[2] What was there being considered was gas. But Scott L.J., in dealing with the matter as to whether gas was an article, said this [3]: "The word 'article' is not defined either in "that section"—that is the section in question here—"or in "section 152, the general definition section. It must, therefore, be "given its ordinary meaning in the English language," and then he refers to certain dictionary meanings. He continues, a little further down the page: "I can see no reason for not regarding all three "substances"—those were the three gases that he was considering —"whether in their solid, liquid or gaseous states, as 'articles.' "So, too, with regard to water and steam. Aerated water is "obviously an article. Steam under pressure can be supplied by "appropriate pipes and sold. Coal gas is bought and sold." The reference there to water is clearly obiter, but, at any rate, it is some support for the view that water, at any rate in some form, can be an article. For my part, I see no reason why it should not be, and I would hold that under section 151 water can be an article.

The next question, then, is whether in any part of the precincts there was a process being carried on for the altering or cleaning of any article or the adapting for sale of any article. The difficulty in regard to adapting for sale is, of course, the question of whether in the supply of water it can properly be said that there is a sale, but I put that out of consideration for a moment. What is said here is that here was a duty which is to be found in the Water Act, 1945, in the Third Schedule, paragraph 31, which is to this effect: "The undertakers shall provide in their mains "and communication pipes a supply of wholesome water sufficient "for the domestic purposes of all owners and occupiers of

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[1] (1883) 11 Q.B.D. 21.

[2] [1948] 2 All E.R. 665.

[3] Ibid. 667.

"premises within the limits of supply who under the special Act "are entitled to demand a supply for those purposes." Accordingly, what they have to do is to make available a supply of wholesome water, and for that purpose they take water as it comes from the springs; they put it through the filter to take away any extraneous matter, and they then purify it or disinfect it by means of chlorination. It is said that what goes out then is something different from what comes into the filter house: that wholesome water fit for drinking goes out; water which cannot be sold as wholesome water comes in, and that that process can fairly be said to be the altering or cleaning of an article. I have come to the conclusion that that argument should succeed. It is said that that is not really consistent with the decision of the Divisional Court in what is called the "milk" case—*Wiltshire County Valuation Committee* v. *London Co-operative Society Ltd.*[4] The matter there under consideration was whether the hereditament in question fell to be derated. It is to be observed that the definition of "factory" for the purposes of the De-Rating Act is to be the definition of "factory" in the Factories Act. It was there held that the process of cleaning and cooling the milk was not adapting an article for sale within the meaning of "factory," for nothing was done to turn an unfinished article into a finished one or anything analogous thereto, and, therefore, the premises were not a factory and so entitled to be derated as an industrial hereditament. Now be it observed that all that was done in the "milk" case was to filter or clean the milk and cool it. Those processes were not done for the direct purpose of sale but in order to enable the milk to be safely carried, that is, carried without deterioration, to another place where it was going to be pasteurised. But, leaving out the question of removing any extraneous matter, the process was, and was really treated in the judgment as, the process of cooling. I do not see how it can be said that milk before and after cooling has been altered in any way or that the milk was adapted for sale by being cooled. The milk in that case was drinkable both before and after it had been cooled. It seems to me that here something very much more is done by the chlorination, and that something which is not drinkable in the proper sense before as wholesome water has been altered, and has become wholesome water which it is the duty of the defendants to supply.

I was also referred to what is called the "beer" case—*Sedgwick* v. *Watney, Combe, Reid & Co.*,[5] but for the purposes of the present case I get, I think, little help from that because the question in that case was whether the process in question was or was not a mere prelude to distribution. It is clear that in that case beer which was undrinkable came into the premises and went out carbonised and bottled and labelled for sale, and, therefore, looked at in that way, it was clearly an adapting for sale. As I have said—although there is, I think, no direct authority on this—I hold that there was here the altering or cleaning of an article. That being so, it is really unnecessary to consider whether there was an adapting for sale. There was clearly, I think, an adapting, but I find it unnecessary to decide whether the supply of water by a public authority can be said to create a contract of sale.

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[4] 66 T.L.R. (Pt. 1) 1016; [1950] 1 All E.R. 937.

[5] [1931] A.C. 447; 47 T.L.R. 308.

So far, therefore, I am with the plaintiff, but the next question that arises, and I think the most difficult question, is the effect of subsection (6). [His Lordship read subsection (6) and continued:] What is said here on behalf of the defendants is this: granted that the filter house being part of the precincts, was a place where the processes of cleaning or altering or adapting were carried out, yet the pump house, which was also within the same precincts, was used for quite a different purpose and not a purpose which of itself would make it a factory. The defendants say that any altering, cleaning or adapting which took place came to an end when the water was in the concrete tank; it had then been filtered and chlorinated, and that all that took place in the pump house was nothing to do with that altering or cleaning or adapting, but was merely putting the water under pressure in order to force it along to the houses that it had to supply. Again I find that there is little useful authority on this. I have been referred to the well-known case of *Thurogood* v. *Van Den Berghs and Jurgens Ltd.*[6] Of course, that was quite a different case because in the engineering shop in that case a bit of machinery was being tested, which bit of machinery was clearly necessary for the making of margarine in the main factory and, as such, the testing there was incidental to the process of the making of margarine. Here it is said that the pumping was in no way incidental to the filtering or the cleaning; that that had already been done, and that this was a separate and new process being carried out in the pumping house. As I understand it, Mr. Blackledge's real case here is that whether or not the pump house can be split, as it were, from the precincts under subsection (6), what is being done in that pump house is every bit as much a matter of alteration or adapting for sale as what is done in the filter house. As he puts it: here is the duty of a local authority to provide wholesome water. It is a duty which, under that paragraph to which I have referred, is to provide that supply in the mains and communication pipes. That, he says, as the Act indeed contemplates, can only be done by putting pressure on the water, and what is being done in the pump house is again an alteration or an adapting for sale, namely, putting the water under pressure. I confess I find it very difficult to accept that argument. Granting that water is an article; granting that the making of wholesome water is the altering, cleaning or adapting of an article, it seems to me that all that is done in the pump house is to put pressure on to that article. And, bearing in mind that this is a penal provision, I find it almost impossible to say that water under pressure, that is, not aerated water or carbonised water, but just water being forced along a pipe, is any different from water, and that there has been any altering or cleaning or adapting by putting pressure on it. It seems to me that the effect of the pressure is just a matter of transport: instead of having tankers to take the water from the concrete tank and deliver it to individual houses, it is forced through the mains to those individual houses. I cannot bring myself to think that the putting of water under pressure for that purpose is an altering of water or an adapting for sale of water. In those circumstances, I have come to the conclusion, rather reluctantly, because I am sorry for this plaintiff, that this action must fail. As I have said, I can find no breach at common law, and, so far as the Factories Act is concerned, although I go with the plaintiff's argument a long way, I think that he fails by reason of subsection (6) in that what is being done in the pump house is something other than the processes for or incidental to what is carried on in the filter house. Accordingly, in my judgment, this action must fail and there must be judgment for the defendants.

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[6] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

I understand, however, that this matter may well go further, and in case it does I would like to add this. If I had found any liability on the part of the defendants I should have found no contributory negligence on the part of the plaintiff. As I said earlier, it may be that he was doing a very stupid thing, but in the state of the evidence and bearing in mind that the onus of proof of contributory negligence is on the defendants, I would have been unable to find any contributory negligence.

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[His Lordship considered the question of the damages which he would have awarded the plaintiff had he been able to find liability, and having assessed these at £4,500 general damages plus £745 special damages, a total of £5,245, concluded:] There must be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors: *Darracotts; William Charles Crocker.*

C. A.

1960
May 10, 11;
June 2.

Lord Evershed M.R., Ormerod and Devlin L.JJ.

COMMISSIONERS OF CROWN LANDS *v.* PAGE.

[1955 C. No. 2978.]

Crown—Contract—Fettering future action—Crown lease—Requisition by Crown—Whether rent remains payable.

Landlord and Tenant — "Eviction" — Constituents — Permanence — Intention — Wrongful — Crown lease — Requisition of demised property by Crown—Whether breach of covenant for quiet enjoyment—Whether such covenant implied.

Landlord and Tenant—Crown lease—Requisition of demised property—Whether tenant "evicted"—Liability for rent during requisition.

Emergency Legislation — Requisitioning — Crown property — Lease — Liability of lessor for rent during requisition—Whether requisition an "eviction."

Crown—Land—Lease—Requisition of demised property—Liability of tenant for rent during requisition.

In 1945, the Minister of Works, acting on behalf of the Crown and in exercise of powers conferred by the Defence (General) Regulations, 1939, requisitioned premises which had been demised in 1937 by the Commissioners of Crown Lands for a term of 25 years. The premises were derequisitioned on September 3, 1955. The lessee paid no rent from April 5, 1945 until July 5, 1955, and the landlords brought proceedings claiming arrears of rent. The lessee alleged that she had been "evicted" by the requisitioning and that, accordingly, payment of rent had been suspended. It was conceded that the Crown was one and indivisible as lessor and requisitioning authority:—

Held, that, since the entry was by the Crown in the proper exercise of its executive authority, it did not amount to an eviction (post, pp. 287, 289), and rent, accordingly, continued to be payable.

Per Lord Evershed M.R. and Ormerod L.J. The limited intention of the Crown to deprive the lessee of her enjoyment was not consistent with the intention requisite to an eviction (post, p. 284). There was no express covenant for quiet enjoyment, and such a covenant could not be implied so as to limit the Crown's future proper exercise of its powers and duties under statute (post, p. 287).

Per Devlin L.J. Even if there was such an express covenant it must by necessary implication be read to exclude those measures affecting the nation as a whole which the Crown took for the public good (post, p. 292).

Quaere, whether the act of entry was of a sufficiently permanent character to amount to an eviction (post, p. 283).

Upton v. *Townend* (1855) 17 C.B. 30 applied.

William Cory & Sons Ltd. v. *City of London Corporation* [1951] 2 K.B. 476; [1951] 2 T.L.R. 174; [1951] 2 All E.R. 85, C.A. applied.

Robertson v. *Minister of Pensions* [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767 distinguished.

Decision of Gorman J. affirmed.

APPEAL from Gorman J.

The following statement of the facts is taken from the judgment of Lord Evershed M.R.

By a lease dated November 23, 1937, and made between the King's Most Excellent Majesty of the first part, the Commissioners of Crown Lands of the second part, and one Rudolph Edgar Francis de Trafford of the third part, there was demised to the party of the third part for a term of 25 years from July 5, 1937, the premises known as No. 4, Cornwall Terrace, and the mews adjoining in the Borough of St. Marylebone in London. The terms of the lease were in common form, but did not include any covenant for quiet enjoyment. The unexpired term of the lease was by deed dated January 14, 1939, duly conveyed to Una, Lady Handley Page, the defendant named in the proceedings. On February 22, 1945, the Minister of Works, on behalf of the Crown and in exercise of the powers conferred by the Defence (General) Regulations, 1939, requisitioned the premises, the subject of the lease, and took (and thereafter until September 3, 1955, retained) possession thereof.

From the date of such requisition, no rent was paid, and the commissioners brought proceedings claiming the sum of £3,280, being arrears of rent alleged to be due under the lease from April 5, 1945, until July 5, 1955. The defendant in her defence relied, inter alia, on the Limitation Act, 1939, and the validity of that defence was conceded so as to limit the claim in the action to the amount of rent alleged to be due in respect of the period of six years immediately preceding the date of the writ.

Lady Handley Page died after the commencement of the suit; and, accordingly, by virtue of an order made in the action on

September 4, 1957, proceedings were afterwards carried on against Sir Frederick Handley Page as executor of the original defendant.

Gorman J. gave judgment for the Crown for £1,920 and the defendant appealed.

Robin Dunn for the defendant. The plaintiffs conceded that the Crown was one and indivisible, so that the requisitioning was by the defendant's landlord. If a landlord takes possession of any part of demised premises without the tenant's consent, he loses his right to receive any rent: *Upton* v. *Townend* and *Upton* v. *Greenlees*.[1] The landlord's entry need not be actionable to constitute an eviction—it is sufficient if it was made without the tenant's consent. Even if, as some of the cases suggest, the entry must be "wrongful," the landlord's action in the present case was "wrongful" in the following respects: first, by depriving the tenant of the occupation of the premises all consideration for the rent had gone; secondly, there was a derogation from the grant, and, thirdly, there was a breach of the covenant for quiet enjoyment. The lease did not contain any express covenant for quiet enjoyment, but one has to be implied either from the relationship of landlord and tenant or from the use of the word "demise."

The fact that the act of the Crown, which is, prima facie, wrongful, may have been justified by the statute passed after the date of the grant, is irrelevant. So also is the fact that compensation may be payable. The compensation payable by the Crown is fixed as the "reasonable rent," and it would be inequitable to have to consider in any particular case whether the compensation offered was "reasonable" before deciding whether the obligation to pay rent had been suspended. The code of compensation and the power of requisitioning fall outside the ordinary law of landlord and tenant and do not affect it.

Eviction does not put an end to a tenancy or affect any of the tenant's covenants, other than the covenant to pay rent. [Reference was made to the statement of general principles in Halsbury's Laws of England, 3rd ed., vol. 23, p. 551, and Woodfall on Landlord and Tenant, 25th ed., p. 369, para. 885.]

[DEVLIN L.J. It may be necessary to distinguish acts done by the Crown in its political capacity from contractual acts. The Crown can vary a contract in exercise of its prerogative, and there is no reason why its own tenants should get preferential treatment. Even if the lease had contained a covenant expressly fettering the executive powers, the covenant would have been void for it would have been contrary to public policy: *Board of Trade* v. *Temperley Steam Shipping Co. Ltd.*[2]]

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[1] (1855) 17 C.B. 30.

It is doubtful whether that principle applies in a case such as the present where the Crown is seeking to rely on the contract to require the payment of money. The Crown is estopped by its own conduct from claiming rent. The position might have been different if the tenant had been seeking to rely on the contract. The tenant has not counterclaimed for damages for the breach of the covenant for quiet enjoyment. That claim would be met by the statute. Apart from any covenant for quiet enjoyment, if a tenant is evicted by his landlord, payment of rent is suspended at common law. None of the authorities refers specifically to a covenant for quiet enjoyment; they are all based on the principle that if the landlord grants an interest in land and, subsequently, takes it away, he is not entitled to payment for it. The nature of the covenant is considered in *Markham* v. *Paget*,[3] and see Foa on Landlord and Tenant, 8th ed., p. 301, para. 438, p. 159. Nothing in the statute suggests that the effect of the requisitioning is to create a compulsory sub-demise. In the present case no one knew how long the requisitioning would last, but the quality of entry was exactly the same whether it was for six years or six months, and payment of rent should be suspended in both cases. The passage in Foa, at p. 160, which suggests that, to constitute eviction, the landlord must intend to deprive the tenant " permanently " of enjoyment of the premises, is not accepted. A mere trespass is, admittedly, insufficient, but a short period of ouster will suffice. The acts of interference must be incompatible with the terms of the demise. In *Cibel* v. *Hills*[4] the entry was temporary.

Peter Foster Q.C. and *J. C. Leonard* for the commissioners. The relationship between the Crown and the tenant does not lie in contract—the tenant was an assignee. The lease created an interest in land and the liability to pay rent was created by that estate and continues until it is destroyed. There is no question of the lease being frustrated (*Swift* v. *Macbean*[5]), for the estate granted by the demise survives the requisitioning, and the requisitioning authority only gets the physical possession of the

[2] (1926) 26 Ll.L.R. 76; affirmed (1927) 27 Ll.L.R. 230, C.A.

[3] [1908] 1 Ch. 697; 24 T.L.R. 426.

[4] (1588) 1 Leo. 110.

[5] [1942] 1 K.B. 375; 58 T.L.R. 110; [1942] 1 All E.R. 126.

land: *Minister of Agriculture and Fisheries* v. *Matthews.*[6] The tenant continues to be entitled under the lease to the rents and profits of the property. The Act does not specifically provide that the Crown is to be a sub-tenant, but the provision of compensation is a notional "rent," and proceeds on the footing that a sub-term has been granted, and that "rent" is payable to the tenant for the period of requisitioning. If the requisitioning has only taken from the tenant one ingredient of his interest in the land in the nature of a sub-tenancy, there has not been any breach of the covenant for quiet enjoyment at all. A breach of that covenant would normally be a wrongful act, but in the present case the existence of a covenant has to be implied and cannot preclude the Crown from executing its statutory authority. Therefore, even if the Crown's act had amounted to a breach of the covenant, it was not actionable, or even wrongful. Eviction cannot take place unless the landlord's act is wrongful: Foa, 8th ed., p. 159, para. 251; *Salmon* v. *Smith*[7] (which may have turned on the pleadings) and *Baynton* v. *Morgan.*[8]

The payment of compensation under an Act of Parliament in some cases takes away from an injured person his common law right to damages, for example, for nuisance, and may in the present case affect the validity of the tenant's defence to the claim for rent: *Marriage* v. *East Norfolk Rivers Catchment Board.*[9] The taking of possession and the result of requisitioning is not such a fundamental and permanent interference with the relationship existing between landlord and tenant as to amount to an eviction at law.

If the defendant is successful Crown tenants will be in a special category, for ordinary tenants have to continue to pay rent even though their premises have been requisitioned. It should also be noted that the tenant would be entitled to receive compensation whether or not she has to continue to pay rent.

It is of the essence of the defence that the requisitioning was without the tenant's consent; that has been conceded in the present case, but in some cases it would be far from clear, and an inquiry would have to be made into the state of mind of the tenant.

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[6] [1950] 1 K.B. 148; 65 T.L.R. 655 (sub nom. *Ministry of Agriculture and Fisheries* v. *Matthews*); [1949] 2 All E.R. 724.

[7] (1669) 1 Wms.Saund. 202; 206 (ed. 1871).

[8] (1888) 21 Q.B.D. 101; affirmed (1888) 22 Q.B.D. 74; 5 T.L.R. 99, C.A.

[9] [1950] 1 K.B. 284; 66 T.L.R. (Pt. 1) 225; [1949] 2 All E.R. 1021, C.A.

Leonard following. The common law rule depends on the obvious good sense that the landlord cannot claim the rent whilst taking away that which he granted, but the rule is inapposite in the present circumstances. None of the cases shows an eviction suspending the payment of rent in which an action would not lie at the suit of the tenant. Where possession has been taken under statutory powers the rights of the parties have to be determined according to the legislative code and there is no scope for the application of the common law rule. The present type of case could not have been in the minds of the framers of the common law rule. The statutory provisions have left untouched the entire structure of the relations between landlords and tenants.

Dunn in reply. The cases do not support the submission that in order to suspend payment of rent the tenant has to show that his estate in land has been destroyed; it has only to be shown that the landlord has entered and taken possession. It is conceded that the compensation received would have to be set off against any unpaid rent, but the payment of compensation does not affect the tenant's right to withhold payment of rent: see *Howell* v. *Falmouth Boat Construction Co. Ltd.*,[10] *Morrison* v. *Chadwick*[11] and *Robertson* v. *Minister of Pensions.*[12] If the Crown enters into a contract, that contract is binding unless expressly varied by statute. Here the legislation under which the tenant was dispossessed is not sufficiently clear to displace the general common law rule on the question of suspension of rent.

Cur. adv. vult.

June 2. The following judgments were read.

Lord Evershed M.R. stated the facts set out above and continued: As Sir Frederick Handley Page in fact acted at all material times on his wife's behalf in relation to the requisition of the premises, I shall hereafter in this judgment treat him as though he had been the assignee of the term granted by the lease, and had been the defendant in the action since its commencement.

The short point raised in the action and the appeal is whether the exercise by the Minister of Works of the power of requisitioning the house and premises at No. 4, Cornwall Terrace, operated as an "eviction" of the lessee as that term is properly understood.

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[10] [1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278, H.L.

[11] (1849) 7 C.B. 266.

[12] [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767.

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It has been conceded that for the purposes of the case the Crown must be regarded as one and indivisible so that the lessor of the property, namely, the Crown, must be treated as having itself requisitioned the property which it (the Crown) had demised, and to have thereby ousted its own lessee from the right of occupation thereof during the period of the requisition; and it has also been conceded that if in truth there was an "eviction," then (at least during the period of its operation) the rent under the lease was suspended. It is then necessary first to ascertain what in law amounts to an eviction, for it is clear that it is not every disturbance of the lessee's enjoyment of his right of occupation that so qualifies.

In Foa on Landlord and Tenant (8th ed.) at p. 159, it is stated: "To constitute an eviction at law the lessee must "establish that the lessor, without his consent or against his will, "wrongfully entered upon the demised premises and evicted him "and kept him so evicted; but if the lessee has sublet, eviction of "his undertenant will, for this purpose, be an eviction of himself. "But actual physical expulsion is not necessary; any act, if of a "permanent character, done by the lessor or by his procurement "with the intention of depriving the tenant of the enjoyment of "the premises demised or any part of them, will be sufficient."

The language used in Foa is closely similar to that found in Halsbury's Laws of England, 3rd ed., vol. 23, p. 552, para. 1211, where it is stated: "To constitute an eviction for this purpose "it is not necessary that there should be an actual physical "expulsion from any part of the premises; any act of a permanent "character done by the landlord or his agent with the intention "of depriving the tenant of the enjoyment of the demised "premises or any part thereof will operate as an eviction. Thus, "there is an eviction if the landlord enters and uses the premises, "the tenant remaining in possession; though a mere trespass by "the landlord is not sufficient. It seems that it will be an eviction if the landlord induces the undertenant to leave by notice "to quit so that the premises are left unoccupied." It will be observed that the citation in Halsbury does not state that the landlord's action must be "wrongful," though Mr. Dunn, as I understood his argument before us, accepted that the landlord's action must have that characteristic to constitute an eviction. It will, however, also be observed from the succeeding paragraph in Halsbury that where a tenant goes out of occupation so as to leave the property vacant, a landlord will protect himself from the effects of an eviction if he relets the property on the tenant's account, giving notice to the tenant accordingly, a proposition supported by the authority of *Walls* v. *Atcheson*.[1]

Mr. Dunn, in opening the case for the defendant, cited to us *Upton* v. *Townend*,[2] a case which, as appears from the textbooks above mentioned, provides much of the foundation for the passages cited. In *Upton* v. *Townend*,[2] certain premises subject to demises to two lessees had been destroyed by fire, and their reconstruction by the Goldsmiths Company (who were treated as equivalent to the landlord or his agent) was such that the identity of the respective demised premises was lost, and possession by the lessees of the true subject-matter of the demises thenceforth made impossible. It was held that there had been eviction of both lessees. Jervis C.J., after stating that "eviction" had formerly connoted expulsion by title paramount, and that it was extremely difficult to define its then meaning with technical accuracy, continued [3]: "Getting rid thus of the old notion of eviction, I think it may "now be taken to mean this—not a mere trespass and nothing "more, but something of a grave and permanent character done "by the landlord with the intention of depriving the tenant of "the enjoyment of the demised premises." Williams J. said [4]: "There clearly are some acts of interference by the landlord with "the tenant's enjoyment of the premises which do not amount "to an eviction, but which may be either mere acts of trespass or "eviction according to the intention with which they are done. "If those acts amount to a clear indication of intention on the "landlord's part that the tenant shall no longer continue to hold "the premises, they would constitute an eviction."

Finally, I cite from Willes J.,[5] who did not, however, in terms attempt a definition so much as a conclusion of the effect of what the landlord in that case had done. He said: "In both cases, "therefore, as it seems to me, the tenant was, by an act of the "landlord, which was intended to be, and was, of a permanent "character, deprived of the perfect and convenient use of the thing "demised."

From the citations which I have made, it seems to me that the act of the landlord (or his agent) in order to constitute an eviction at law must at least have certain characteristics which, though they have not been (and may not indeed be capable of being) precisely defined, will be regarded as satisfied or not satisfied according to the standards of common sense and ordinary

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[1] (1826) 3 Bing. 462.
[2] (1855) 17 C.B. 30.
[3] Ibid. 64.
[4] Ibid. 68.
[5] Ibid. 75.

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understanding in the light of the facts of each particular case. I leave aside at this stage the question of the "wrongfulness" of the landlord's act. But apart from any requisite of wrongfulness, the landlord's act must (1) be of a "permanent character," and (2) be done with a particular "intention," namely, that of disabling the tenant from continuing to "hold" the subject of his demise, or of depriving him of the "enjoyment" of the thing demised, or some part thereof. I add (and I think it important for reasons later appearing) that a disturbance of the requisite quality of a sub-tenant will operate as an "eviction" of the lessee himself. Does the exercise of the statutory power of requisition have the required characteristics to constitute an eviction? I have come to the conclusion that it does not.

The act of requisitioning was done pursuant to regulation 51 of the Defence (General) Regulations, 1939, regulations originally made pursuant to the Emergency Powers (Defence) Act, 1939, but later continued in operation by virtue of the Supplies and Services (Transitional Powers) Act, 1945. Its effect was the "taking of possession or control on behalf of His Majesty" of the house in Cornwall Terrace; and its purpose and justification the maintenance, so long as the emergency conditions immediately following the last war subsisted, of (so far as here relevant) "supplies and services essential to the life of the community." By virtue of the Compensation (Defence) Act, 1939, the lessee became entitled to compensation in accordance with section 2 (1) (*a*) of "a sum equal to the rent which might reasonably be "expected to be payable by a tenant in occupation of the land, "during the period for which possession of the land is retained "in the exercise of emergency powers, under a lease granted "immediately before the beginning of that period" together also (in this case) under subsection (1) (*b*) with the sum required to make good any damage done during the requisition period. Subsection (2) of the same section provides that the compensation under the first above-mentioned head should, inter alia, be paid to the person who "for the time being would be entitled to "occupy the land but for the fact" of the requisition.

First, has the landlord's act the required characteristic of "permanence"? I am prepared to accept Mr. Dunn's submission that the word "permanent" in the relevant context does not mean "for ever" or "in perpetuity." It may not always indicate "for the whole unexpired term of the lease." It is, no doubt, used in contradistinction to "temporary." I agree also with Mr. Dunn that the period of the requisition (as it in fact endured) in the present case, namely, 10 years, was, particularly in relation to the unexpired term of the lease at the date of the requisition, namely, 17 years, substantial. Nevertheless, I think there is much to be said for the view that the characteristic of permanence to constitute an eviction was not here satisfied. The powers of requisition were measures intended for an emergency situation, to last only so long as the "emergency" itself lasted. It is not, to my mind, without significance that the relevant statutory authority for the exercise of the powers in the present case bore the titles "Emergency Powers (Defence) Act," and "Supplies and Services (Transitional Powers) Act." In other words, although the "emergency" which justified and required the use of the powers was of uncertain duration, still it was an "emergency," and would fairly be regarded accordingly as of a temporary rather than of a permanent nature according to the ordinary sense of those words.

On the other hand, I appreciate that a contract may be frustrated by a requisitioning of its essential subject-matter—for example, a contract of charterparty by the requisitioning of the ship which is the subject of the charter—unless the requisitioning is of a merely "temporary" character as that word would be ordinarily understood.

The truth may be that, although the word "permanent" may in the relevant context be used by way of antithesis to "temporary," yet the argument may not thereby be much advanced, for what one may mean by "temporary" as a matter of ordinary language may greatly vary according to the circumstances in which it is used. And although a requisition of premises might be readily so described if it lasted for a few weeks or months only, the answer might be otherwise in a case where the duration of the requisition, whatever had been originally contemplated, was for a period of more than 10 years. I prefer, therefore, to express no view upon this aspect of the matter, but turn to the second requisite of intention.

What was the "intention" which should be attributed to the Crown when exercising its powers under the regulations? In answering this question it is to be borne in mind (1) that under the prevailing post-war conditions it must be taken as generally accepted and understood that all occupiers of property, whether freeholders or leaseholders or under-tenants, were liable to be called upon to submit to the "possession or control" of their premises being taken by or on behalf of His Majesty for essential public purposes; (2) that, as was conceded before us, the Crown, upon the exercise of its requisitioning powers, acquired thereby no estate or proprietary interest in the property taken; and (3) that the compensation payable, particularly that under section 2 (1) (*a*) of the Compensation (Defence) Act, 1939, and the provisions as to its payment under subsection (2), postulate that the estate, the proprietary interest, of the freeholder or of the lessee (in the present case) should remain undisturbed save only that the Crown should have actual occupation of the property. As a matter of law, the requisitioning authority should, therefore, as I think, be taken to have acquired the right of occupation as compulsory licensee. In any event, the situation of the lessee in such a case as the present cannot be put higher than that he was, by the effect of the statute and the regulation and order made thereunder, compelled to quit the premises; but the occupier was bound to pay him a "rent" appropriate to the situation if (in the present case) the Crown, the freeholder, had become also the sub-tenant.

I do not attempt any further definitions, or any exposition of the language used in the cases, including *Upton* v. *Townend*.[6] The exceptional situation—the situation of national emergency—with which the Acts of 1939 and 1945 were designed to deal was obviously something not at all contemplated by the common law of 100 years before. In my judgment, the "intention" to be attributed to the Crown, when it exercised its powers and performed its executive duty, cannot fairly be said to have been an intention on its part qua landlord of depriving the lessee of his "enjoyment" of the premises, or to have been an intention that the lessee should not continue to "hold the premises." It may, no doubt, be said that the "intention" must have been to deprive the lessee (in the language of Willes J.) of the "perfect "and convenient use" of the premises; but my answer to that suggestion is that Willes J.'s words were used (as I have earlier stated) not by way of definition of "eviction," but as a description of what the effect of the landlord's action was on the facts in *Upton* v. *Townend*.[6]

Possession of premises in law includes the right to receive their rents and profits; and that right, as it seems to me, was preserved notwithstanding the requisition. The matter is, to my mind, further illustrated if the case is supposed where the Crown's lessee has underlet the premises. If Mr. Dunn's contention is accepted, then it would seem to follow that the requisition of the premises in the hands of the under-tenant would amount to an eviction of the lessee; and if so, then not only would the lessee be disabled from receiving rent thereafter from his under-tenant, but (since the under-tenant's interest would have gone with the eviction of the lessee) the under-tenant would appear himself to be deprived of any right to compensation as being no longer entitled, but for the requisition, to occupy the land. Such a result is, in my view, wholly at variance with the intendment of the relevant legislation.

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[6] 17 C.B. 30.

In justice to the defendant in the present case, it must be stated that he has not sought to receive the "rent" compensation under section 2 (1) (*a*) of the Compensation (Defence) Act, 1939, without a set-off or deduction of the rent payable under the lease. But in strictness I can see no justification for the concession. If he has been effectively evicted, then it may be said he has ceased to be "entitled," apart from the requisition, to occupy the land. Alternatively, if he is still so "entitled," then he would appear to be able to receive the "rent" compensation in full, even though his liability for rent under the lease be suspended. It may be added that it is not, as I understand it, in dispute that upon termination of the requisition, the defendant became entitled to the full enjoyment of the subject of the demise until its termination in 1962.

In the result, therefore, the "intention" to be attributed to the Crown cannot, in my judgment, be put higher than this: an intention to disturb the lessee's enjoyment to the extent only of requiring him to submit to the Crown's occupation of the premises as a licensee during the "emergency" without otherwise qualifying the lessee's interest or "possession" under the demise, and upon terms that the lessee should, by way of "rent" and otherwise, be fairly compensated for the licence; in other words, that the lessee should be put in no worse position than he would occupy if he had granted a sub-tenancy for the duration of the requisition on terms appropriate to a sub-demise between a willing sub-lessor and sub-lessee. In my judgment, such a conception is not consistent with the intention requisite to an "eviction."

It will be recalled that I earlier put aside the question whether the landlord's act, amounting to an eviction, must also have the quality of being "wrongful" as well as done "without the "lessee's consent." In the present case it was conceded by Mr. Foster that the defendant should be taken not to have consented to the requisition. I cannot, however, refrain from observing that, as it seems to me, this matter of consent introduces something of an unreality into the matter. It is plain that in at least the great majority of cases of requisitioning, absence of consent on the occupier's part could have made no difference whatever in the result. The Crown was exercising not only a power, but a generally accepted duty. It would appear to me strange that the question whether rent was or was not suspended should depend upon the consent or absence of consent, in a state of national emergency, of the occupier concerned, upon whether in such circumstances the occupier formally indicated an absence of consent on his part.

However that may be, was the requisition in any sense "wrongful"? Mr. Dunn, as I have said, did not dispute the necessity of "wrongfulness" if there was to be "eviction." But he contended that the wrongfulness need not be actionable. I would agree with him that "wrongful" in its context does not mean tortious; and apart from its effect upon any of the terms of the lease it is clear that the act of the Crown in requisitioning the house was not sensibly "wrongful" seeing that it was done in pursuance of a statutory power and a statutory duty. But it was Mr. Dunn's submission that the requisition was "wrongful" in that (1) the Crown thereby deprived its lessee of possession, and therefore that the consideration for the rent had gone; (2) the Crown had thereby derogated from its grant; and (3) the Crown was in breach of its implied covenant for quiet enjoyment.

I am unable to accept either of the first two heads of alleged wrongfulness. The first, indeed, seems to me to beg the question at issue. Moreover, since the lessee is (according to the Compensation (Defence) Act, 1939) entitled to receive the compensation "rent," he is not, for reasons already indicated, deprived of "possession" in the legal sense. I refer again also to the case where the occupant at the time of the requisition was a subtenant. Similarly, if the views I have above expressed are correct, it cannot, in my judgment, be said that the Crown has derogated from its grant.

There remains the question of the covenant (implied in this case) for quiet enjoyment. This has occasioned me a little greater difficulty. I observe, however, that Mr. Dunn conceded in his argument that he would have no cause of action for breach of the implied covenant, whether or not because the lessee suffered no damage. If this concession was rightly made, it seems to me, I confess, somewhat contrary to logic and common sense that nonetheless the lessee can allege breach of covenant.

But there is, I think, another answer. There is here no express covenant. It is well established that, in the absence of an express covenant, a covenant for quiet enjoyment will be implied by virtue of the "demise." I am not, however, satisfied that in a demise by the Crown the covenant implicit in the demise would extend to prevent the future exercise by the Crown of powers and duties imposed upon it in its executive capacity by statute. Whatever might be the position if the demise had contained an express covenant unqualified in terms (upon which I prefer to express no opinion), I think that any implied covenant should be treated as qualified to the extent indicated.

This view is, I think, supported by the decision of Lord Goddard C.J. and the Court of Appeal in *William Cory & Sons Ltd.* v. *City of London Corporation.*[7] In that case the promulgation by the defendant corporation, under its statutory power and duty, of new by-laws, which made the continuation of the contract between the corporation and the plaintiffs commercially impossible, operated to frustrate the contract; but both courts rejected the plaintiffs' argument that the notice given to the plaintiffs by the corporation of the latter's intention to make the new by-laws operated as an anticipatory repudiation of the contract by the corporation on the ground that no term could be implied in the contract (and none was expressed) that the corporation would not exercise the by-law making powers and duties under statute in a way which would be inconsistent with the terms of the contract.

So in the present case it might, I conceive, be said that the terms of the demise (which contained in express terms no provision to the contrary) must be treated as impliedly subject to the effect of any proper exercise in the future of the Crown's executive authority. It is, however, sufficient in the present case to hold that no covenant for quiet enjoyment should be implied which would limit the Crown's future proper exercise of its powers and duties under statute; in other words, that there was here no "wrongfulness" in the Crown's requisition. On this ground, as upon the ground of absence of the requisite "intention," I think, accordingly, that there has been no "eviction" established on the part of the Crown.

I should add that upon the question of the implied covenant for quiet enjoyment we were referred to the view expressed by Denning J. in *Robertson* v. *Minister of Pensions*,[8] to the effect that in the present day and age no distinction should be drawn as to the legal effect of its or their actions between the Crown and ordinary subjects, so that the effect of a representation made by the Crown could no longer be qualified so as to be subject to the future exercise by the Crown of its executive authority. The case was, however, upon its facts, very different from the present; and the judge's general proposition was disapproved by Viscount Simonds and Lord Normand in the later case of *Howell* v. *Falmouth Boat Construction Co. Ltd.*[9] I do not, therefore, think that Mr. Dunn's contention upon this point can be sustained by reference to *Robertson's* case.[10]

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[7] [1951] 1 K.B. 8; 66 T.L.R. (Pt. 2) 265; [1950] 2 All E.R. 584; affirmed [1951] 2 K.B. 476; [1951] 2 T.L.R. 174; [1951] 2 All E.R. 85, C.A.

[8] [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767.

I would, therefore, dismiss the appeal.

Ormerod L.J. I have had the opportunity of reading in advance the judgment which has been delivered by Lord Evershed M.R., and I am in full agreement with the views he has expressed.

The question, as I see it, however, can be sufficiently determined on the ground that the action of the Minister in requisitioning the demised premises did not contain the element of wrongfulness which appears to be essential in an eviction; and it is only if the action of the Minister amounts to an eviction that the obligation to pay rent would be suspended. Mr. Dunn conceded in the course of his argument that in order to amount to an eviction an act must be wrongful, but submitted that such an act need not necessarily be tortious.

It is not easy to state with precision what constitutes the element of wrongfulness. The relevant passages in the judgments in *Upton* v. *Townend*[11] have already been cited, and it is unnecessary to repeat them. Crowder J. is the only judge in whose judgment the word "wrongful" appears, but it is clearly implicit in the language of the other judgments. In 1855, of course, when *Upton* v. *Townend*[11] was under consideration, no question of requisitioning arose, and the forms of interference by the lessor with the demise which were in the contemplation of the judges were trespass on the one hand, and on the other, to quote the words of Jervis C.J., something of a "grave and "permanent character done by the landlord with the intention "of depriving the tenant of the enjoyment of the demised "premises." In either event, the act in question would be a wrongful act. There are various reasons why a landlord may enter on the demised premises, or otherwise interfere with the demise, which could not be regarded as wrongful. He may enter by leave of the lessee, or in pursuance of the provisions of the lease, and for the purposes therein provided. If, however, his entry was not by leave, or pursuant to his powers under the lease, then it appears that his action would be wrongful and amount to a trespass or an eviction, or (which may well amount to the same thing) a breach of the lessor's covenant for quiet enjoyment.

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[9] [1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278, H.L.

[10] [1949] 1 K.B. 227.

[11] 17 C.B. 30.

The question to be considered in this case is whether the action of the Minister in exercising his powers of requisition under the regulations made pursuant to the Emergency Powers (Defence) Act, 1939, and continued under the Supplies and Services (Transitional Powers) Act, 1945, was wrongful, or whether his interference with the full enjoyment of the demise was an act which should not be so regarded. He was acting in pursuance of statutory authority, which gave him the right to enter upon premises and take possession of them if he regarded it as necessary so to do in the interests of the public safety. It would be surprising if an act authorised by statute which was proper in the case of other premises should be regarded as wrongful in the case of premises demised by the Crown. If the act of entry was as of right, whether pursuant to the provisions of the lease, or pursuant to statute, it is difficult to see how it could be wrongful. In my judgment, it cannot be so regarded.

Mr. Dunn submitted that the act of the lessors was wrongful because it was in breach of the lessor's covenant for quiet enjoyment. There was no express covenant in the lease, and Mr. Dunn had, therefore, to rely on the covenant implied from the use of the word "demise." Of course, a breach of the covenant for quiet enjoyment may be so fundamental that it amounts in effect to an eviction, thereby terminating the obligation of the lessee for rent; on the other hand, it may be such as to do no more than give rise to an action for damages. In this case, if there was a breach, it might well be regarded as fundamental; but I cannot accept that a covenant for quiet enjoyment implied in a lease from the Crown must be taken to go so far as to imply an undertaking by the Crown to refrain from exercising statutory powers in respect of the demised premises which the Crown may properly deem necessary. The position in regard to an express covenant does not arise here, and therefore I express no opinion upon it.

In my judgment, the action of the Crown in requisitioning the demised premises in this case did not amount to an eviction, and did not give any ground for the suspension of the obligation of the lessee to pay rent. I would, therefore, dismiss the appeal.

DEVLIN L.J. The obligation to pay rent continues so long as the tenancy lasts, and whether or not the tenant is in occupation or enjoyment of the premises, unless he is evicted by the landlord. Eviction does not necessarily involve physical expulsion; an act that deprives the tenant of the enjoyment of the premises, or part of them, may be sufficient. The liability to pay rent, and the corresponding liability of the landlord not to interfere with the tenant's enjoyment of what he has been granted flow out of the grant of the estate, and are independent of covenant, though it would now be an exceptional lease which did not contain a tenant's covenant to pay rent, and a landlord's covenant of quiet enjoyment.

An eviction or breach that goes to the root of the covenant (and for practical purposes they are the same thing) is a defence to an action for rent. The defendant, therefore, relies, as her only defence to the claim by the Commissioners of Crown Lands for rent, upon the action of the Commissioners of Works (as they then were) in requisitioning the premises. It has been admitted that the Crown is one and indivisible, and acts as much through the Commissioners of Works as through the Commissioners of Crown Lands. There can be no doubt, therefore, that the Crown dispossessed the defendant.

The element of wrongfulness which is generally said to be necessary to constitute an eviction means, in my judgment, no more than the breach by the landlord of his obligation—whether that obligation be expressed or implied, and whether it arises from covenant, or from the letter itself—to leave the tenant undisturbed except to the extent that he has expressly reserved the power to re-enter. This obligation, whatever its source, is one and the same in character and extent; and that is why it is unfruitful to distinguish between an eviction and a breach that goes to the root of the covenant of quiet enjoyment. Since it is conceded that there is in this lease an implied covenant for quiet enjoyment, I shall deal with the extent of the Crown's obligation by reference to that covenant.

Has the Crown committed a fundamental breach of the covenant? To answer that question one must consider the true scope and object of the covenant in such a lease as this where the Crown is the grantor. On the face of it, and if the covenant is taken as read without any limitation, there has been a breach.

The Crown has deprived the defendant of the enjoyment of the demised premises for a long and indefinite period, and has done so deliberately, and (if one ignores the compulsion of public duty) has done so of its own free will; its act was authorised, but was not required by the statute. But, it is said by the Crown, it is not an act done as landlord, and it lacks other necessary constituents of the act of eviction.

I think that it may well be that the covenant of quiet enjoyment is limited to acts that are done by the landlord in supposed assertion of his rights as landlord, and that other trespasses, however grave, are outside the covenant. But because the landlord in this case is also the Crown, I have found it on the whole simpler to answer the question in the case not by reference to any special limitation on the covenant of quiet enjoyment affecting all landlords, but by reference to the general limitation that affects all contracts or covenants entered into by the Crown, or for that matter by any other public authority.

When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute, with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms, undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers, and in the exercise of its discretion. This principle has been accepted in a number of authorities; it is sufficient to mention *Ayr Harbour Trustees* v. *Oswald*[12]; *Rederiaktiebolaget Amphitrite* v. *The King*[13]; *Board of Trade* v. *Temperley Steam Shipping Co. Ltd.*[14] and *William Cory & Sons Ltd.* v. *City of London Corporation.*[15]

The covenant for quiet enjoyment in the present case is implied, and is not dissimilar to the contractual provision considered in the two cases last cited, which were both concerned with the implied obligation on one party to a contract not to interfere with the performance by the other party of his obligations under it. In *Board of Trade* v. *Temperley Steam Shipping Co. Ltd.*,[16] the Board were the charterers of the defendant's ship, and it was contended that they had prevented the defendants from making their ship efficient for her service under the charterparty because one of the Board's surveyors had refused a licence to do

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[12] (1883) 8 App.Cas. 623, H.L.

[13] [1921] 3 K.B. 500.

[14] (1926) 26 Ll.L.R. 76; affirmed (1927) 27 Ll.L.R. 230, C.A.

[15] [1951] 2 K.B. 476, C.A.

[16] 26 Ll.L.R. 76.

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Comrs. of Crown Lands v. Page.

Devlin J.

certain repairs. In *William Cory & Sons Ltd.* v. *City of London Corporation*,[17] the city corporation had a contract with the plaintiffs whereunder the plaintiffs undertook to remove refuse by means of lighters and barges. Some time later the city corporation passed a by-law concerning the fitment of vessels transporting refuse which it was agreed was such as to make the performance of the contract impossible. It was held by the Court of Appeal that the corporation was not in breach of the implied term.

I do not, however, rest my decision in the present case simply on the fact that the covenant for quiet enjoyment has to be implied. For reasons which I think will appear sufficiently in the next paragraph, I should reach the same conclusion if the ordinary covenant was expressed.

In some of the cases in which public authorities have been defendants, the judgments have been put on the ground that it would be ultra vires for them to bind themselves not to exercise their powers; and it has also been said that a promise to do so would be contrary to public policy. It may perhaps be difficult to apply this reasoning to the Crown, but it seems to me to be unnecessary to delve into the constitutional position. When the Crown, in dealing with one of its subjects, is dealing as if it too were a private person, and is granting leases or buying and selling as ordinary persons do, it is absurd to suppose that it is making any promise about the way in which it will conduct the affairs of the nation. No one can imagine, for example, that when the Crown makes a contract which could not be fulfilled in time of war, it is pledging itself not to declare war for so long as the contract lasts. Even if, therefore, there was an express covenant for quiet enjoyment, or an express promise by the Crown that it would not do any act which might hinder the other party to the contract in the performance of his obligations, the covenant or promise must by necessary implication be read to exclude those measures affecting the nation as a whole which the Crown takes for the public good.

During the last war the Ministries of War Transport, Food and Supply were trading on a vast scale, and were also issuing orders under their statutory powers which quite frequently frustrated their own contracts, or those made by some other government department. The Minister of Supply, for example, might be found prohibiting all importation of a commodity of a sort which he had contracted to buy; or the Ministry of War

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[17] [1951] 2 K.B. 476, C.A.

Transport might fail to make cargo space available for another department's purchases. So far as I am aware, there is no case in which it has been contended that because of such action, the Crown was in breach of contract. That shows the general understanding under which such business was done. If at the time of making any such contract the "officious bystander" had asked whether it was clear that the Crown was not undertaking to limit the use of its general executive powers, I think that there could have been only one answer. That is the proper basis for a necessary implication. I need not examine the question whether, if the Crown sought to fetter its future action in express and specific terms, it could effectively do so. It is most unlikely that in a contract with the subject, it would ever make the attempt. For the purpose of this case it is unnecessary to go further than to say that in making a lease or other contract with its subjects, the Crown does not (at least in the absence of specific words) promise to refrain from exercising its general powers under a statute or under the prerogative, or to exercise them in any particular way. That does not mean that the Crown can escape from any contract which it finds disadvantageous by saying that it never promised to act otherwise than for the public good. The distinction was clearly put by Roche J. in *Board of Trade* v. *Temperley Steam Shipping Co. Ltd.*,[18] where he said: "I think "and I hold that in this charterparty it is to be implied that the "Crown should do nothing in connection with and in relation to "and in the carrying out of the contract contained in the charter-"party to prevent the shipowners from keeping the vessel sea-"worthy and to prevent them earning their hire. But I am "utterly unable to imply in the charterparty a term or condition "that the Crown should do nothing by virtue of some general "legislation or by virtue of some executive action entirely remote "from the charterparty and done by persons not connected with "the performance of the contract directly or indirectly to bring "about the results in question." That is a different thing from saying that the Crown can never bind itself in its dealings with the subject in case it might turn out that the fulfilment of the contract was not advantageous. The observations of Denning J. in *Robertson* v. *Minister of Pensions* [19] on the doctrine of "executive necessity" were, I think, directed to a case of that sort. Here we are dealing with an act done for a general executive purpose, and not an act done for the purpose of achieving a particular result under the contract in question.

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[18] 26 Ll.L.R. 76, 78.

[19] [1949] 1 K.B. 227, 231.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.
Leave to appeal granted.

Solicitors: *Allen & Overy; Treasury Solicitor.*

E. D.

1959
Oct. 7, 22, 23.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

LAYTON *v.* SHIRES.

Road Traffic—Notice of intended prosecution—Service of notice—Notice sent by registered post to defendant's usual residence—Defendant away on holiday—Notice received and signed for by member of defendant's family, or by "nanny" in his employ—Defendant not aware of notice until more than 14 *days after commission of alleged offences—Whether "sent by registered post to him"—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 26*—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

Statute — Construction — Service of document by post — Meaning of "sent by registered post"—Road Traffic Act, 1930, *s.* 21 (*c*).

The defendant was charged with driving without due care and attention, alternatively without reasonable consideration for other persons using the road, contrary to section 12 of the Road Traffic Act, 1930. Pursuant to section 21 of the Act[1] notice of intended

[Reported by Grove Hull, Esq., Barrister-at-Law.]

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[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for "an offence under any of the provisions of this Part of this Act "relating respectively to the maximum speed at which motor vehicles "may be driven, to reckless or "dangerous driving, and to careless "driving he shall not be convicted "unless either—(*a*) he was warned "at the time the offence was committed that the question of prosecuting him for an offence under some "one or other of the provisions aforesaid would be taken into consideration; or (*b*) within fourteen days of "the commission of the offence a "summons for the offence was "served on him; or (*c*) within the "said fourteen days a notice of the "intended prosecution specifying the "nature of the alleged offence and "the time and place where it is "alleged to have been committed was "served on or sent by registered post "to him or the person registered as "the owner of the vehicle at the time "of the commission of the offence: "Provided that—(i) Failure to comply "with this requirement shall not be a "bar to the conviction of the accused "in any case where the court is "satisfied that—(1) neither the name "and address of the accused nor the "name and address of the registered "owner of the vehicle, could with

prosecution was within 14 days addressed to him and sent by registered post to his home address. When the notice arrived at this address the defendant had left for a holiday abroad and the registered packet was received and signed for by a member of his family or by a "nanny" in his employ. The defendant first became aware of the notice when he opened the packet on his return, more than 14 days after the date of the alleged offences:—

Held, that the sending of the notice by registered post to the defendant's address within 14 days of the alleged offences and its acceptance by a person authorised to accept letters on his behalf was a compliance with section 21 of the Act although the notice did not reach the defendant's hands within the statutory period.

Beer v. *Davies* [1958] 2 Q.B. 187; [1958] 2 W.L.R. 920; [1958] 2 All E.R. 255 distinguished.

CASE STATED by Surrey justices sitting at Reigate.

On October 27, 1958, informations were laid by the appellant prosecutor against the defendant, Wellburn Bertram Shires, that he on August 31, 1958, on a road in Beare Green, Surrey, drove a motor-car without due care and attention, alternatively without reasonable consideration for other persons using the road, in each case contrary to section 12 of the Road Traffic Act, 1930. The defendant was both the owner and the driver of the motor-car.

The justices heard the informations on December 10, 1958, when the defendant contended that the provisions of section 21 of the Act had not been complied with. The justices tried this issue as a preliminary matter and found the following facts. At the time of the alleged offences the defendant was informed by a police officer that he would be reported for failing to keep to the left when meeting oncoming traffic. The summonses which were served upon the defendant in respect of the alleged offences were served more than 14 days after August 31, 1958. On September 11 a notice of intended prosecution made in accordance with the provisions of section 21 of the Act was sent by registered post to the defendant at his home address. On September 12 the registered packet containing the notice was delivered at this address and was received and signed for either by a member of the defendant's family or by a "nanny" in his employ. On September 11, however, the defendant, in accordance with arrangements made some time before the date of the alleged offences, had gone abroad for a holiday. He first became aware

"reasonable diligence have been "ascertained in time for a summons "to be served or for a notice to be "served or sent as aforesaid; or "(2) the accused by his own conduct "contributed to the failure; and "(ii) the requirement of this section "shall in every case be deemed to "have been complied with unless and "until the contrary is proved."

of the notice when he opened the packet on the date of his return, October 1, 1958. He had not informed the police of his intention to go abroad.

It was conceded by the prosecutor that the oral warning given at the time of the alleged offences did not satisfy the provisions of section 21, but he contended that the notice was sent by registered post to the defendant within 14 days within the meaning of the section.

On behalf of the defendant it was contended that the section required that the notice should reach the defendant personally.

The justices were of opinion that the provisions of the section had not been complied with, and that the defendant had not contributed to the failure to serve the notice within 14 days. They accordingly decided the preliminary issue in favour of the defendant. The prosecutor appealed.

A. C. L. Lewisohn for the prosecutor. Before the decision in *Beer* v. *Davies* [2] there were a number of cases in this court which showed that a notice of intended prosecution was properly served if it was sent by registered post to the defendant's address. *Beer* v. *Davies* [2] followed the Court of Appeal's decision in *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi.*[3] The Court of Appeal did not, however, purport to decide that the earlier cases in this court were wrong. *Sandland* v. *Neale* [4] was the last of these cases, and it is submitted that it was rightly decided, and that it is open to this court to follow either that case or *Beer* v. *Davies.*[5]

It is also submitted that the defendant, by going abroad, caused a state of affairs in which his address could not with reasonable diligence have been ascertained in time for the notice to be served, so that the case is within the first proviso to section 21 of the Act of 1930. It is conceded that the defendant's conduct in going abroad did not fall within the second proviso.

In *Beer* v. *Davies* [5] the notice of intended prosecution was never delivered at the defendant's house. There is a valid distinction in that, in the present case, the notice was taken in and signed for by a member of the defendant's household. Section 26 of the Interpretation Act, 1889, shows that there must be delivery, and in the present case there was. The person receiving the letter must receive it with the defendant's authority. The onus is on the defendant to show that such a person acted without authority.

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[2] [1958] 2 Q.B. 187; [1958] 2 W.L.R. 920; [1958] 2 All E.R. 255.

[3] [1956] 1 Q.B. 682; [1956] 2 W.L.R. 800; sub nom. *Reg.* v. *Appeal Committee of County of London Quarter Sessions, Ex parte Rossi* [1956] 1 All E.R. 670.

[4] [1956] 1 Q.B. 241; [1955] 3 W.L.R. 689; [1955] 3 All E.R. 571.

[5] [1958] 2 Q.B. 187.

Raymond Stock for the defendant. The defendant, to succeed, must prove first that he never physically received the notice of intended prosecution within 14 days and, secondly, that the contents were never within that period communicated to him by the person who did so receive it. *Money* v. *Bicknell*[6] was a decision which turned on the onus of proof; on the particular facts of that case it was impossible to establish that the contents of the notice were never communicated to the defendant, and the present case can be readily distinguished. *Beer* v. *Davies*[7] and *Ex parte Rossi*[8] decided that personal service was necessary, subject to the savings in the provisos to section 21 of the Act. In *Ex parte Rossi*[8] the Court of Appeal held that "send" meant "send so as to draw to the notice of the defendant personally." It is conceded that, if the letter reaches the hands of the defendant and he does not open it, he cannot escape. [Reference was made to *Retail Dairy Co. Ltd.* v. *Clarke*[9] and *Martin* v. *Brooman.*[10]]

Alternatively, if it be enough for the prosecution to establish that the notice was received by the defendant's authorised agent, there was evidence that the person who took in the notice in the present case had no authority to do so.

Lewisohn in reply. In *Money* v. *Bicknell*[11] the court found that there was an irresistible inference that the person taking in the notice was the defendant's agent. Here such an inference must, at any rate, be a proper one.

Cur. adv. vult.

1959. October 23. ASHWORTH J. read the following judgment of the court: This is an appeal by way of case stated by justices for the petty sessional division of Dorking, sitting at Reigate, before whom informations were preferred by the prosecutor against the defendant that he on August 31, 1958, did drive a motor-car on a road without due care and attention, alternatively that he drove it without reasonable consideration for other persons using the road, in each case contrary to section 12 of the Road Traffic Act, 1930.

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[6] Unreported, April 10, 1959.

[7] [1958] 2 Q.B. 187.

[8] [1956] 1 Q.B. 682.

[9] [1912] 2 K.B. 388; 28 T.L.R. 361.

[10] (1909) 25 T.L.R. 783.

[11] Unreported, April 10, 1959.

This is yet another case raising the question whether the provisions of section 21 of the Act had been complied with. At the trial the solicitor for the defendant took the preliminary point that there had been no compliance with the section, and the justices upheld that contention.

[His Lordship read section 21 of the Act and continued:] It is agreed that there was no sufficient warning at the time when the alleged offences were committed, and the summonses were not served until the statutory period of 14 days had expired. The sole question, therefore, is whether the provisions as to the service of a notice of intended prosecution were complied with, subject, of course, to the proviso.

[His Lordship stated the facts and continued:] The question is as to the meaning of the words "sent by registered post to "him," bearing in mind section 26 of the Interpretation Act, 1889, which provides: "Where an Act passed after the commencement of this Act authorises or requires any document to "be served by post, whether the expression 'serve,' or the "expression 'give' or 'send,' or any other expression is used, "then, unless the contrary intention appears, the service shall "be deemed to be effected by properly addressing, prepaying, and "posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the "letter would be delivered in the ordinary course of post." It is, we think, clear, since the decision of this court in *Beer* v. *Davies*,[1] that the requirement of section 21 of the Act of 1930 is not complied with if the registered letter is not taken in at the address to which it is sent and is returned. That decision, which is binding on this court, followed the decision of the Court of Appeal in *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi*,[2] and on this point departed from the interpretation put upon the words in previous decisions.

In the present case, however, the letter was in fact taken in and signed for and was not returned. It is true that the letter did not reach the hands of the defendant until after the statutory period of 14 days had expired but, in our judgment, the decisions in *Ex parte Rossi* [2] and *Beer* v. *Davies* [3] do not compel us to hold that in such circumstances the section was not complied with. If a notice under section 21 (*c*) of the Act is sent by registered post to a defendant, and delivery of it is accepted either by him or by someone authorised to accept delivery of letters on his behalf, we are of opinion that the section is complied with, even if the letter does not reach his hands within the statutory period. This view is in accordance with the decision of this court in *Money* v. *Bicknell*,[4] which was decided in April 1959, that is to say, after the decisions in *Ex parte Rossi* [5] and *Beer* v. *Davies*.[6] Moreover, it is to be noted that section 21 (*c*) provides that a notice may be served on or sent to the proposed defendant or, alternatively, the person registered as the owner of the vehicle at the time of the commission of the offence. If the latter alternative be adopted, there is no certainty that the proposed defendant will himself become aware of the intended prosecution within the statutory period. The existence of this alternative method of complying with the section serves to confirm our opinion that actual receipt within the period of a notice addressed to a proposed defendant is not required. This is enough to decide this case and it is unnecessary to consider provisos (1) and (2).

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[1] [1958] 2 Q.B. 187; [1958] 2 W.L.R. 920; [1958] 2 All E.R. 255.

[2] [1956] 1 Q.B. 682; [1956] 2 W.L.R. 800; sub nom. *Reg.* v. *Appeal Committee of County of London Quarter Sessions, Ex parte Rossi* [1956] 1 All E.R. 670.

In these circumstances the case must go back to the magistrates with an intimation that the requirement of the section has been complied with.

Appeal allowed.
Costs.

Solicitors: *Wontner & Sons; J. B. Izod.*

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[2] [1956] 1 Q.B. 682.
[3] [1958] 2 Q.B. 187.
[4] Unreported, April 10, 1959.
[5] [1956] 1 Q.B. 682.
[6] [1958] 2 Q.B. 187.

CLOSE *v.* STEEL COMPANY OF WALES LTD.

[1957 C. No. 2609.]

C. A.

1960
May 26, 27;
June 2.

Lord Evershed M.R., Ormerod L.J. and Davies J.

Factory—Dangerous machinery (fencing)—Parts ejected from machine —Drilling bit shattered—Whether "dangerous part" of machine —Whether risk of injury reasonably "foreseeable"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

By the Factories Act, 1937, s. 14: "(1) Every dangerous part "of any machinery . . . shall be securely fenced. . . ."

The plaintiff was operating an electric drill when the bit shattered and he was struck and injured in the left eye by one or more pieces which flew out. In an action against his employers for damages for breach, inter alia, of their statutory duty under section 14 (1) of the Factories Act, 1937, Winn J. held that that duty was solely to prevent the workman from coming into contact with the machine and not to protect him against injury caused by parts of the machine which flew out, and that, accordingly, the defendants were not liable to the plaintiff. On appeal:—

Held, (1) that the duty imposed on an employer by section 14 (1) to fence every dangerous part of a machine comprehended both the prevention of a workman coming into contact with moving parts of the machine and the protection from injury caused by ejected or flying parts of the machine itself (as distinct from injury caused by flying or ejected pieces of the material on which the machine was working) (post, pp. 316–317).

(2) That a part of a machine should not be regarded as "dangerous" within the language of section 14 unless the risk of injury could be fairly described as reasonably foreseeable in the ordinary course.

Dickson v. *Flack* [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840, C.A. applied.

Hindle v. *Birtwistle* [1897] 1 Q.B. 192; 13 T.L.R. 129, D.C.; *Walker* v. *Bletchley Flettons Ltd.* [1937] 1 All E.R. 170 approved.

Rutherford v. *Glanville (R. E.) & Sons (Bovey Tracey) Ltd.* [1958] 1 W.L.R. 415; [1958] 1 All E.R. 532, C.A. considered.

Nicholls v. *F. Austin (Leyton) Ltd.* [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92, H.L. and *Carroll* v. *Barclay (Andrew) & Sons Ltd.* [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386, H.L. distinguished.

(3) That in this case the risk of grave injury was not reasonably foreseeable, and, therefore, the bit was not a "dangerous part of ". . . machinery" within the scope of the statutory duty, and, accordingly, that the defendants were not liable (post, p. 317).

Hindle v. *Birtwistle* (supra) applied.

Per curiam. There would appear to be no logic or common sense in excluding from the scope of the statutory duty the case where an ejected fragment happens to be part of the material on which the machine is working, as distinct from a part of the machine itself (post, p. 317).

Decision of Winn J. affirmed in part on different grounds.

APPEAL from Winn J. sitting at Swansea Assizes.

On January 24, 1956, Leo Close, then 33 years of age, an instrumental machinist employed by the defendants at their Abbey Works, Margam, Glamorganshire (which was admittedly a "factory" within the meaning of the Factories Act, 1937), was operating an electric drill equipped with a high-speed steel bit. The drill was a portable one of a type in common use and it was clamped to a stand so that it worked in a vertical position. The operator would insert a bit made of very hard steel into the drill chuck and then lower the drill to the object to be drilled. On this occasion Close (hereinafter called "the plaintiff") was drilling 1/16in. holes through a small, mild-steel gear-wheel; the bit was operating at up to 2,000 revolutions per minute when it shattered and one or more of the fragments went into the plaintiff's left eye, causing serious injury. The plaintiff sued the defendant company, both on the ground of common law negligence and breach of the statutory duty imposed by section 14 (1) of the Factories Act, 1937.[1] At the hearing the judge found that it was not uncommon for a bit to break, and the defendants' expert witness said that possibly one would break each week in the works and the fractured parts would be thrown outwards by centrifugal force. There was a risk of a serious eye injury, such as the loss of an eye, but it was a very small risk and "extremely remote" because the fragments would fly out level with the bit or downwards and normally not more than two feet from the drill. He found no evidence of known prior accidents or any evidence that the defendants knew or had reason to foresee an injury of any consequence from a breaking. The witness said that although the employers took no precautions, such as requiring the workman to wear goggles or fencing the drill, their practice was in "exact "alignment with every other employer" of which he had knowledge. He, himself, would have been quite happy to have worked that particular machine all day. Winn J. dismissed the action under both heads of claim and the plaintiff appealed against the dismissal of the claim for breach of statutory duty.

H. Emlyn Hooson Q.C. and *Bruce Griffiths* for the plaintiff. A part of a machine can be dangerous either (a) because a workman may inadvertently or advertently come into contact with it, or (b) because a piece or pieces of the machine may fly out. The duty imposed by section 14 (1) extends to protect a workman against both types of danger.

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[1] Factories Act, 1937, s. 14: "(1) "Every dangerous part of any machinery . . . shall be securely fenced "unless it is in such a position or of "such construction as to be as safe to "every person employed or working "on the premises as it would be if "securely fenced: Provided that, in "so far as the safety of a dangerous "part of any machinery cannot by "reason of the nature of the operation be secured by means of a fixed "guard, the requirements of this subsection shall be deemed to have "been complied with if a device is "provided which automatically prevents the operator from coming into "contact with that part."

[Davies J. referred to *Newnham* v. *Taggart Morgan & Coles Ltd.*[2]]

Prior to *Nicholls* v. *F. Austin (Leyton) Ltd.*[3] it had not been suggested in any of the reported decisions, or in the submissions made to the court in those cases, that section 14 (1) should be construed narrowly so as to apply only to the first type of danger: see *Hindle* v. *Birtwhistle*[4]; *Walker* v. *Bletchley Flettons Ltd.*[5] and *Kinder* v. *Camberwell Borough Council.*[6] *Harrison* v. *Metropolitan Plywood Co.*[7] was concerned with the Woodworking Machinery Regulations, 1922. In *Walker* v. *Bletchley Flettons Ltd.*[8] a part of a machine was regarded as dangerous if there was a possibility of injury to anyone acting in a way which it was reasonable to act in circumstances which might reasonably be expected to occur. In *Nicholls* v. *F. Austin (Leyton) Ltd.*[9] it was said that the obligation imposed by the subsection is to guard against contact and not against dangerous materials flying out; the question was left open whether there was any relevant distinction between a piece of the machine and the material which was being operated on by that machine. *Carroll* v. *Barclay (Andrew) & Sons Ltd.*[10] turned on section 13. In *Dickson* v. *Flack,*[11] however, the judgment of Denning L.J. was based entirely on the requirements of section 14, and though Singleton L.J. founded himself primarily on regulation 17 of the Woodworking Machinery Regulations, 1922, he said that he would be prepared to hold that there had been a breach of section 14 and, therefore, he answered the question expressly left open in *Carroll's* case.[12] *Dickson* v. *Flack*[13] is binding on this court: see *Newnham* v. *Taggart Morgan & Coles Ltd.*[14]

The proviso to subsection (1) of section 14 does not apply, for the defendants have not sought to establish that this drill could not have been operated if it had been effectively guarded. It is not an aid to the construction of the scope of the main provision for it may have a more limited scope. In a consolidation Act, such as that of 1937, the court would not readily find that the meaning of a provision had been altered. The proviso must, therefore, be taken to mean no more than it actually says.

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[2] (Unreported), C.A. judgments, 1956, No. 220.

[3] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92, H.L.

[4] [1897] 1 Q.B. 192; 13 T.L.R. 129, D.C.

[5] [1937] 1 All E.R. 170.

[6] [1944] 2 All E.R. 315.

[7] [1946] K.B. 255; 62 T.L.R. 109; [1946] 1 All E.R. 243.

[8] [1937] 1 All E.R. 170.

[9] [1946] A.C. 493, H.L.

[10] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386, H.L.

[11] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840, C.A.

[12] [1948] A.C. 477.

[13] [1953] 2 Q.B. 464, C.A.

[14] Unreported.

In *Rutherford* v. *Glanville (R. E.) & Sons (Bovey Tracey) Ltd.*[15] the obligation to fence was conceded, but, whether conceded or not, Lord Goddard C.J. was evidently appraised of the remarks in the House of Lords and yet of the opinion that as there was a risk of part of the machine disintegrating and causing injury, there was a duty to fence. These two cases in the Court of Appeal show that the speeches in the House of Lords in *Nicholls* v. *Austin*[16] should be qualified to the extent that section 14 (1) must be taken as covering every case where it can be reasonably foreseen that there is a risk of injury from pieces of the machine. The evidence here shows that a bit might be expected to break in normal working; it was therefore "dangerous" within the meaning of the section and the plaintiff should succeed.

Bruce Griffiths following. The earlier legislation and *Newnham* v. *Taggart Morgan & Coles Ltd.*[17] were not referred to before Winn J.

Alun Davies for the defendants. It is conceded that a revolving drill is a dangerous part of machinery to the extent that even when it is used in a normal manner, as in the present case, there is a foreseeable risk that the bit may shatter. That, however, does not give rise to a duty under section 14 (1), because both the proviso and the main part of the subsection are limited to requiring that an operator should be kept from coming into contact with the machine, and when a drill breaks away from the machine it has ceased to be a dangerous "part of that machine." Section 14 is concerned with the protection of a workman against a dangerous part whilst that part is operating in situ. Further, although the bits sometimes break, it is abnormal for a broken bit to hit a man in the eye: the evidence showed that there had been no previous instance of such an injury—unlike the evidence in *Hindle* v. *Birtwistle*.[18]

[Ormerod L.J. referred to *Associated Motor Cycles Ltd.* v. *Bramley Harker*.[19]]

The employer is not required to create perfect conditions, and if something which is not remotely foreseeable happens, he is not liable. [*Smithwick* v. *National Coal Board*[20] was referred to.]

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[15] [1958] 1 W.L.R. 415; [1958] 1 All E.R. 532, C.A.

[16] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92, H.L.

[17] Unreported, C.A. judgments, 1956, No. 220.

[18] [1897] 1 Q.B. 192, D.C.

[19] Nov. 18, 1942 (unreported), Redgrave, 9th ed., p. 47.

[20] [1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173, C.A.

In *Nicholls* v. *Austin*[21] the injury was caused by material which was thrown out of the machine, but the House of Lords plainly decided that the duty under section 14 was limited to preventing contact with the machine itself, and in the view of their Lordships that interpretation of the subsection was supported by the proviso. *Carroll* v. *Barclay*[22] supports that interpretation. *Dickson* v. *Flack*[23] turned on regulation 17 of the Woodworking Regulations. In *Kilgollan* v. *Cooke (William) & Co. Ltd.*[24] the state of affairs which existed was highly dangerous and the court found for the plaintiff on the common law duty. They found, however, that there was no liability under section 14 (1) to guard against injury caused by material which had been placed in the machine and was thrown out. If, therefore, the subsection is interpreted in the way suggested by the plaintiff, a distinction will have to be made between ejected parts of the machine itself and ejected pieces of material on which the machine was working. Not only would that be an artificial distinction, but it would probably mean that protection was afforded in cases where the danger was less than in cases where it was refused. The test of liability is the real substantial danger. To give rise to liability under the subsection there must be a known risk of danger in the normal working of the machine; not only that breakage is likely to occur, but that it will cause injury to others. In *Rutherford* v. *Glanville (R. E.) & Sons (Bovey Tracey) Ltd.*,[25] the guard was not securely in position. There was no evidence that the holds came loose in the normal course or that wheels disintegrated frequently and were expelled against the guard. In *Dickson* v. *Flack*,[26] *Hindle* v. *Birtwhistle*[27] and *Newnham* v. *Taggart Morgan & Coles Ltd.*[28] the danger against which the employer was to safeguard his employees was a recognised risk. There is no evidence in this case of a likelihood of injury. The case is stronger than *Newnham* v. *Taggart Morgan & Coles Ltd.*,[28] for there have been a number of breakages over the years but no previous instance of injury having been caused, either in this industry or in the numerous others where this type of bit is used. The degree of risk was so slight that the workmen were not required to wear goggles. Even if *Dickson* v. *Flack*[29] was rightly decided this case is distinguishable.

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[21] [1946] A.C. 493, H.L.

[22] [1948] A.C. 477, H.L.

[23] [1953] 2 Q.B. 464, C.A.

[24] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294, C.A.

[25] [1958] 1 W.L.R. 415, C.A.

[26] [1953] 2 Q.B. 464, C.A.

[27] [1897] 1 Q.B. 192, D.C.

[28] Unreported, C.A. judgments, 1956, No. 220.

[29] [1953] 2 Q.B. 464, C.A.

H. Emlyn Hooson Q.C. in reply. The distinction between a part of the machine and a component does not derive from *Dickson* v. *Flack*[29] but is inherent in section 14 itself. This was clearly a dangerous part of the machine because it was reasonably foreseeable that there might be an accident of this sort—such an accident could happen and, therefore, there was a foreseeable risk. *Walker* v. *Bletchley Flettons Ltd.*[30] was cited with approval in *Summers (John) & Sons Ltd.* v. *Frost*,[31] though Lord Reid thought that " possible " went too far.

Cur. adv. vult.

June 2. LORD EVERSHED M.R., reading the judgment of the court, stated the facts, read section 14 (1) of the Factories Act, 1937, and continued: The sole question raised in the appeal is whether the defendants were in breach of the statutory duty imposed by section 14 (1) of the Factories Act, 1937; for if they were, it is not in doubt that the plaintiff's accident was a direct consequence of the breach.

The true question may indeed, in our judgment, be more concisely stated thus: on the facts of the case as found by the judge, was the part of the drilling machine into which the bit was inserted (or, possibly, was the bit itself) a " dangerous part " of the machine? Upon the evidence in the case it was found by the judge that the fracture or shattering of these bits in the ordinary course of the working of the machine was common enough. So much is not in dispute. Mr. Davies, for the defendants, conceded that it could be taken as a weekly occurrence in the shop. It is at this point that, in our judgment, the crucial difficulty arises. It seems clear enough upon the evidence that the result of the breakage of a bit is that its fractured parts are thrown outwards by the rapid revolutions of the instrument. The judge's findings upon this vital matter of fact were as follows: " Mr. Hewitt [an expert witness] did not know of any employer " who fenced or covered any hand-drill as distinct from pillar " drills, and he told me that no precautions were to his knowledge taken against the risk of eye injuries for shattered drill " bits, which he regarded as a very small risk, albeit a risk of a " grave injury. He agreed it was a frequent occurrence for a bit " to break, and that when it did break it usually shattered into " fragments which fly about, though normally they fly only a

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[29] [1953] 2 Q.B. 464, C.A.

[30] [1937] 1 All E.R. 170.

[31] [1955] A.C. 740, 765; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870, H.L.

"couple of feet at the most, usually less, and only fly level or "downwards . . . there is no evidence of known prior accidents "caused by fragments through a flying out, nor any evidence that "the defendants or any responsible representative of theirs had "knowledge of or any reason to foresee an injury from a breaking "of any consequence at all. I do not exclude the distinct "possibility that there might be superficial scratches or minor "penetrating wounds, of the hands in particular. . . . Although "it would be inaccurate to say that the bit of this drill was not "a dangerous part of machinery within the test hitherto accepted "and applied, it is not a part the dangerous character of which "is in the same category of danger as the danger involved in "spinning a carborundum wheel at 4,000 revolutions, or in spinning the type of wood-cutting machinery which is dealt with "in the cases to which I shall be referring. The danger involved "in the case of this type of 1/16 in. high-speed carbon steel bit "is a danger of the occurrence, or a risk of the occurrence, on not "infrequent occasions, of very slight and trivial injury; together "with a remote (and in my judgment extremely remote) risk of "the occurrence, in very exceptional conditions, of such a grave "injury as most unfortunately was suffered by this plaintiff on "this occasion. I think that it is right, as Mr. Breuan Rees [for "the plaintiff] urged upon me to say, and I do accept this from "him, that it was foreseeable that such an injury to the eye of "a drill operator would or might sooner or later—in the course "of many hundreds of thousands of operations—occur. But it "was not a risk which a reasonable man would have foreseen "would occur in his factory within measurable time, within it "might be the lifetime of any particular workman. The risk was "as remote in my judgment as that."

It is never easy in a case of this kind—and in an extemporary judgment—to express a finding with the clarity and precision sufficient to satisfy the later discussion in the Court of Appeal; though we are very far from criticising in this respect the language used by the judge in his very careful judgment. But we were, in the circumstances, properly referred to the transcript of the evidence. Mr. Hooson, for the plaintiff, suggested that the statement by the judge to the effect that the pieces would not fly out at an angle higher than the plane of the base of the instrument was not really justified; that a workman might well in any case bring his eye down to that level or very near it; and that if the entry of a fragment into the worker's eye was something foreseeable at all, then it was an accident which however improbable on any given day yet might happen tomorrow no less probably than 30 years ahead. On the other side it was said by Mr. Davies that the ejection of a fragment in an upward direction was something that would not occur except in unusual circumstances not to be expected or readily explained; and that, though an accident such as occurred to the plaintiff was foreseeable in the sense that it could not be excluded from contemplation if you thought about it, still it was something the chances of the happening of which were so remote that it was only foreseeable in the sense that it was capable of rational imagination; but on the other hand could not be reasonably expected to happen in the ordinary course of working—a view supported by the evidence that, although the use of these drills was extremely well known, no similar accident had ever been recorded: in other words, that it was foreseeable in the same way that you would describe as foreseeable the chance that a man walking along the pavement might be run down by a motor-car which for some quite exceptional reason had mounted the kerb. It was further said by Mr. Davies (and this was not, we think, in dispute) that the injuries which a man might in the ordinary course receive from flying pieces of bit (for example, a slight scratch on the hand) were too trivial for notice since the pieces were not ejected, according to the evidence, more than about a couple of feet and could not be said to fly with any force. Finally, Mr. Davies drew attention to the circumstances (material in considering the question of danger) that the judge had rejected the suggestion that goggles ought to be provided (as the evidence showed that they never had been) and acquitted the defendants of any common law negligence—conclusions which Mr. Hooson did not challenge before us. [His Lordship referred to the evidence and continued:] What, then, is the true conclusion? In our judgment, the findings of the judge should not be taken as intending a foreseeable risk greater than that formulated by Mr. Davies. Put in its briefest form, we think that the plaintiff's accident was not one which could or would be reasonably foreseeable in the ordinary course though it was one which those responsible, if they had closely reflected upon it, would have said could happen though the chances were extremely remote.

If this is the right conclusion of fact, then are the defendants liable? As we have earlier stated they are so liable if, but only if, the relevant part of the machine can fairly and sensibly in the circumstances be called a "dangerous" part; for unless that premise is satisfied there is nothing in the section to impose liability.

Unhappily the difficulties of the case do not end there, for it is apparent that where accidents have arisen from the ejection of pieces of the machine itself (broken or otherwise) there has been a difference of judicial opinion in the cases which extend to a divergence of opinion in the House of Lords itself.

The first is *Hindle* v. *Birtwistle*.[1] That was a case where the workman had been injured in a cotton mill by a shuttle, part of a cotton weaving machine, which flew off the machine as (according to the evidence) was a not uncommon experience with such machines. The case fell to be decided under section 5 of the Factories Act, 1878, and section 6 of the Act of 1891, which correspond in terms with subsection (1) of section 14 of the Act of 1937 save for the absence of the proviso to the modern subsection. Wills and Wright JJ. thought the obligation to fence had arisen. Wills J. said [2]: "It seems to me that machinery "or parts of machinery is and are dangerous if in the ordinary "course of human affairs danger may be reasonably anticipated "from the use of them without protection. No doubt it would "be impossible to say that because an accident had happened "once therefore the machinery was dangerous. On the other "hand, it is equally out of the question to say that machinery "cannot be dangerous unless it is so in the case of careful "working. In considering whether machinery is dangerous, the "contingency of carelessness on the part of the workman in "charge of it, and the frequency with which that contingency is "likely to arise, are matters that must be taken into considera"tion. It is entirely a question of degree." Then Wright J. in his judgment said [3]: "The mere fact that the shuttle will some"times fly out, and that when it flies out it is dangerous, is not "enough. It is a question of degree and of fact in all cases "whether the tendency to fly out is a tendency to fly out often "enough to satisfy a reasonable interpretation of the word "'dangerous.'"

The case was followed by later decisions including that of du Parcq J. in *Walker* v. *Bletchley Flettons Ltd.*,[4] to which Mr. Hooson particularly referred and which related to injury inflicted in analogous circumstances by part of a mechanical excavator. The relevant section (in that case) of the Act of 1901 like its predecessor contained no such proviso as is to be found in section 14 (1) of the Act of 1937, and du Parcq J. regarded as

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[1] [1897] 1 Q.B. 192; 13 T.L.R. 129, D.C.

[2] [1897] 1 Q.B. 192, 195.

[3] [1897] 1 Q.B. 192, 196.

[4] [1937] 1 All E.R. 170.

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dangerous a part of a machine which might be[5] "a possible cause "of injury to anybody acting in a way in which a human being "may be reasonably expected to act in circumstances which may "be reasonably expected to occur." It is true, as Winn J. pointed out, that in *Summers (John) & Sons Ltd.* v. *Frost*[6] Lord Reid somewhat criticised the use by du Parcq J. of the words "possible cause" and would have preferred to substitute "reasonably foreseeable cause"; but we do not think that for present purposes the criticism is material. We feel little doubt that prior to the decision of *Nicholls* v. *F. Austin (Leyton) Ltd.*[7] in 1946, and the possible effect of the addition of the proviso to section 14 (1) of the consolidating Act of 1937, the law was that for the purposes of the factory legislation a part of a machine was regarded as dangerous if there was a reasonable likelihood (to use for present purposes no more precise a formula) of injurious parts of the mechanism flying off the machine in the ordinary course of its operation.

We come then to *Nicholls* v. *F. Austin (Leyton) Ltd.*[8] In that case the workman had been injured by a piece of wood ejected by a circular saw in the course of its operation—not, be it observed, by a fractured piece of the machine itself but by a piece of the material on which the machine was operating. The House held that there was no breach of section 14 (1) of the Factories Act, 1937, "since" (and we quote from the headnote) "the obligation to fence imposed by section 14 (1) was an obligation to guard against any contact with any dangerous part of "a machine and not to guard against dangerous materials ejected "from it."

Since the decision, if rightly summarised in the headnote, would ex facie be decisive against the plaintiff in the present case, it is, we think, necessary to cite at some length from the speeches of the noble Lords. Thus Lord Thankerton said[8]: "At "the trial, the first point argued before the learned judge was "whether the obligation to fence imposed by subsection (1) of "section 14, is an obligation not only to protect against direct "injury by contact with the machine, but also against indirect "injury from something that flies off from the machine." Then "he says[9]: "My Lords, on consideration of the terms of section "14, I am of opinion that there is a simpler answer to the

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[5] [1937] 1 All E.R. 170, 175.

[6] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870, H.L.

[7] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92, H.L.

[8] [1946] A.C. 493, 498.

[9] Ibid. 499.

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"contention of the appellant, namely, that the obligation to fence "imposed by subsection (1) is an obligation to provide a guard "against contact with any dangerous part of a machine, and that "it does not impose any obligation to guard against dangerous "materials or articles ejected from the machine in motion, that "matter depending solely on the making of regulations by the "Secretary of State under the discretionary power conferred on "him by the last paragraph of the section. This view appears "to be amply confirmed by the language used. In the first place, "subsection (1) is dealing with fencing of dangerous parts of "any machine, and not with dangerous machines, whereas the "dangerous materials or articles do not necessarily emanate from "a dangerous part of a machine; further, the reference to the "exception where the position or construction is such that it is as "safe to every person employed or working on the premises as "it would be if securely fenced suggests safety from contact with "the dangerous part, and this is stated in terms at the end of "the proviso to subsection (1)." Lord Macmillan said[10]: "The "obligation under section 14 to fence the dangerous part of a "machine, as I read it, is an obligation so to screen or shield "the dangerous part as to prevent the body of the operator from "coming into contact with it, and this obligation was in the "present instance amply fulfilled." Lord Simonds said[11]: "I "find nothing in this language to suggest that the section aims "at protecting the worker from any indirect danger arising out "of the functional operation of the machine. If there was any "ambiguity, it would be set at rest by the proviso, which provides "that 'in so far as the safety of a dangerous part cannot by "'reason of the nature of the operation be secured by means of a "'fixed guard, the requirements of this subsection shall be "'deemed to have been complied with if a device is provided "'which automatically prevents the operator from coming into "'contact with that part.' These last six words make it clear "that the security at which the substantive part of the subsection "aims is security from unintentional or I suppose even intentional "contact with a dangerous part. The fence is intended to keep "the worker out, not to keep the machine or its product in." Finally, we cite from the opinion of Lord Uthwatt[12]: "Section "14, subsection (1), applies to 'every dangerous part of any "'machinery other than prime movers and transmission "'machinery.' That dangerous part is to be securely fenced

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[10] [1946] A.C. 493, 501.
[11] Ibid. 504.
[12] Ibid. 506.

"unless it—i.e., the dangerous part—is in such a position or of "such construction as to be safe. The proviso to the subsection "is of assistance. Where a fixed guard is not practicable as "respects a dangerous part, the provision of a device which "prevents contact between the operator and that part is to satisfy "the obligation contained in the leading provision of the sub-"section. The prevention of contact between the worker and "the dangerous part is to be sufficient."

As we have said, *Nicholls* v. *Austin*,[13] if it had stood unqualified would have been, in our view, decisive against the present plaintiff; for although the case before the House was one where the injury had been caused by a flying piece of the material on which the machine was working and not by a flying piece of the machine itself, still the language which I have cited seems to us clearly to show that the conclusion was reached upon the basis that section 14 (1) of the Act should be construed as intended to limit the duty thereby imposed to a duty to guard against contact with the machine. In reaching their conclusion of construction the noble lords were plainly influenced by the terms of the proviso to the subsection introduced for the first time in the Act of 1937. Upon this last point, we cannot refrain from observing that (as Mr. Hooson submitted to us) the Act of 1937 is expressed in its heading as a consolidating Act; that, accordingly, subsection (1) of section 14 ought prima facie not to be construed as substantially altering the law; and that it is, at least, a legitimate interpretation of the terms of the proviso to treat it as meaning no more than it strictly says, namely, that if the premise of its opening words is satisfied, then compliance with the requirement of what follows will be a satisfaction of the obligation of the subsection even though the "danger" contemplated by the earlier part of the subsection is not thereby effectively guarded against—an argument upon the construction of the subsection and its proviso not apparently noticed in the speeches or the arguments.

Two years later there came before the House *Carroll* v. *Andrew Barclay & Sons Ltd.*[14] In that case the workman had been injured by a belt which had for some reason broken and had lashed out upon the workman. The employers were held not liable; but since the belt was part of the transmission machinery, the case fell to be determined under section 13 and not section 14 of the Act. The headnote contains the sentence "*Quaere* "whether, in the case of a machine which in working might be

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[13] [1946] A.C. 493.

[14] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386, H.L.

"expected to throw off loose or broken parts, there might be an "obligation to fence it for the purpose of protecting the workman "against that danger." The justification for this last sentence is mainly found in the speeches of Viscount Jowitt L.C. and Lord du Parcq. The last sentence of the short speech of the former is [15]: "At the same time I should desire to leave open for "further consideration the question which Lord du Parcq raises "in his opinion." Lord du Parcq said [16]: "I wish to add, "however, that, while I agree with Lord Normand that the words "'securely fenced' must be given the same meaning in each of "the three sections (sections 12, 13 and 14), I think that they "may well mean 'so fenced as to give security from such dangers "'as may be reasonably expected.' If machines exist, or are "hereafter invented and used, which are dangerous because "fragments or loose parts of the machinery are sometimes ejected "from them, then I am not prepared to say that section 14 does "not require such machines to be fenced for the purpose of "protecting workmen against that danger. If the dictum of my "noble and learned friend Lord Simonds in *Nicholls* v. *F. Austin* "*(Leyton) Ltd.*[17] is to be understood as meaning that such a "machine need not be fenced, I respectfully doubt its accuracy, "and must reserve my opinion upon it."

There is, as we read them, no such clear reservation in the speeches of Lord Porter and Lord Normand—though the former says [18]: "Even in the case of the flying spindle, it was not a "breaking of a part of the machine but an accident which might "have been expected from its ordinary working which had to be "guarded against," and Lord Normand says [19]: "It is possible, "therefore, that if a machine may be expected to throw off "detachable or broken parts in working, these parts may fall to "be treated as dangerous and subject to the requirements of "secure fencing." Lord Normand nevertheless at the end of his speech [20] expressly adopts as correct the language of Lord Simonds in *Nicholls* v. *Austin* [21] which, in the view of Lord du Parcq, might require qualification. There are also other passages in the speeches of Lord Porter and Lord Normand which we do not take time to quote but which seem to us to lend support to the view summarised in the headnote to *Nicholls* v. *Austin*.[21] We do not find anything in the speech of Lord Morton of Henryton which assists the matter either way.

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[15] [1948] A.C. 477, 482.
[16] Ibid. 486.
[17] [1946] A.C. 493.
[18] [1948] A.C. 477, 485.
[19] Ibid. 490.
[20] Ibid. 492.
[21] [1946] A.C. 493, 505.

In that state of the law *Dickson* v. *Flack*[22] came in 1953 before this court consisting of Singleton, Denning and Morris L.JJ. The injury suffered in that case arose from a cutter which flew off a spindle in a woodworking machine. That such an occurrence might well happen in the course of the operation of the machine is clearly shown by two paragraphs of the report which read[23]: "During the six-day hearing before Havers J., "evidence was given by expert witnesses which showed that the "danger of some part being thrown from such a machine moving "at such a high speed had been recognised for many years by "those in the trade and those responsible for safety precautions "in woodworking shops. In particular, two pamphlets were "before the court. The first, published by the Home Office in "1928"—and then he gives the title of it—"warned that 'the "'vertical spindle moulder or shaping machine is one of the most "'dangerous tools in common use. It causes a large number of "'accidents yearly.' It emphasised the danger from contact "with the cutters, and continued: 'The fatal accidents are "'caused by cutters breaking off or coming loose, and being "'hurled away with great velocity, due to the centrifugal force "'developed by their exceptionally high speed . . .' and concluded: 'It is therefore of prime importance that suitable safe"'guards should be chosen for each operation and that cutters "'should be set with scrupulous care.' The second pamphlet, "first published in 1935 and reprinted for the Factory Depart"ment of the Ministry of Labour and National Service in 1947" —and he gives the reference to that—"while stressing the danger "from flying cutters, gave diagrams of guards which could be "used for this type of work and (at p. 14) stated: 'The danger "'to workers at neighbouring machines or benches can be "'minimised by the provision of guards and screens which will "'intercept a flying cutter.'"

Liability was alleged to arise both or alternatively under regulation 17 of the Woodworking Machinery Regulations, 1922, and under section 14 (1) of the Act. It is true that Morris L.J. founded his conclusion in favour of the workman upon the regulation, and that Singleton L.J. founded himself primarily upon that regulation. Singleton L.J., however, added this at the end of his judgment[24]: "If it can be said that regulation 17 does not

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[22] [1953] 2 Q.B. 464; [1953] 2 All E.R. 840, C.A.

[23] [1953] 2 Q.B. 464, 467.

[24] Ibid. 477.

"go so far, I would be prepared to hold that there was a breach "of section 14 with the like result, though I prefer to base my "judgment on regulation 17." Denning L.J. said[25]: "But, it "is said, the decision of the House of Lords in *Carroll's* case[26] "binds us to hold that the Factories Act does not protect workmen from pieces which fly out of machines. That case does "not warrant any such proposition. The decision there turned on "the fact that the belt was in such a position as to be as safe as it "would be if it was securely fenced. That is one of the exceptions in the Act. It has no place in the case before us. The "House of Lords distinctly kept open the case of a machine "which 'may be expected to throw off detachable or broken parts "'in working.' Lord Normand said that[27] 'these parts may "'fall to be treated as dangerous and subject to the requirements "'of secure fencing.' This, in my opinion, is such a case. I am "of opinion that any part which may be expected to throw off a "loose part is itself a dangerous part and ought to be securely "fenced under section 14."

Winn J. in the present case appears to have thought that these views of Denning L.J. were not necessary for his conclusion; but with all respect to the judge we are unable to agree. It seems to us clear that Denning L.J. founded himself primarily upon his view of liability under section 14 and no less clear that Singleton and Denning L.JJ. answered the question expressly left open by Lord du Parcq in *Carroll's* case,[28] when applied to the facts in *Dickson* v. *Flack*[29] in a sense favourable to the workman —the sense for which Mr. Beney had contended in his argument.

The question of liability for injury from flying parts of a machine came before this court again, Lord Goddard C.J. presiding, in *Rutherford* v. *Glanville (R. E.) & Sons (Bovey Tracey) Ltd.*[30] It is true, as Winn J. observed, that the decision may be said primarily to have rested upon the view that, the necessity of a fence having been conceded, the fence used was shown not to have been "secure." Lord Goddard C.J., however, seems to have accepted the view, whether conceded or not, that a known risk of injury through flying bits of the machine involved a duty to guard it under section 14. "This machine," he said,[31] "had "to be fenced because there was a risk of the carborundum wheel, "which it protects, disintegrating and thereby causing injury."

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[25] [1953] 2 Q.B. 464, 478.
[26] [1948] A.C. 477.
[27] Ibid. 490.
[28] [1948] A.C. 477.
[29] [1953] 2 Q.B. 464.
[30] [1958] 1 W.L.R. 415; [1958] 1 All E.R. 532, C.A.
[31] [1958] 1 W.L.R. 415, 417.

We were finally referred to a third case before this court consisting of Lord Goddard C.J., Denning and Birkett L.JJ., *Newnham* v. *Taggart Morgan & Coles Ltd.*[32] The judgments are dated July 19, 1956. The case was not cited to Winn J. It is not reported and the court is indebted to my brother Davies for drawing our attention to it. In that case a band saw broke and the plaintiff was injured by a piece of the broken saw which flew out and struck him. As the case is not reported it will be convenient if we make substantial citations from the transcript in the Bar Library both because the precise facts are thereby made plain and also by reason of the statements of the law which they contain.

Lord Goddard C.J. said: "If it is a dangerous piece of "machinery, by reason of section 14 of the Factories Act, it "should be fenced. But we have had the advantage now of "considering the cases which have been decided in this court and "in the House of Lords. I need only mention a few of them: "*Nicholls* v. *Austin (F.) (Leyton) Ltd.*[33]; *Carroll* v. *Barclay* "*(Andrew) & Sons Ltd.*[34] and *Dickson* v. *Flack.*[35] Those cases "lay down that the obligation which is imposed by section 14 "prima facie is to prevent the person of the operator coming into "contact with a dangerous machine. That is the prima facie "object of the section; it is not to keep in pieces either of the "material or of the machine should it break.

"Nonetheless, it is quite clear from those cases that the law "now requires fencing of a machine which it is known may cause "danger to operators by reason of its breaking if that breaking is "a risk which is, as I would put it, inherent or likely to occur in "the working of the machine. Perhaps the commonest case "which the decisions show may be anticipated is in cotton mills, "because there it is a not uncommon experience that shuttles "fly out, and if they fly out, of course, they may cause danger "to the operator. Therefore, the cases show that precautions in "the way of fencing must be taken for the purpose not only of "preventing the operators coming into contact with high speed "machinery but for preventing the shuttles flying out and causing "danger to the operator.

"In the particular case of this saw it is conceded that as "in the case of all mechanical saws there is a risk of the saw "breaking. Apparently it is very seldom that the saw breaks,

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[32] (Unreported), C.A. judgments, 1956, No. 220.

[33] [1946] A.C. 493.

[34] [1948] A.C. 477.

[35] [1953] 2 Q.B. 464.

"but it is known to happen. So far as is known those breaks "have occurred when machines have been under load, that is to "say, when timber was being fed to the saw. Such an accident "as that with which we are concerned has apparently never "happened before in the history of the machine, though there "have been an infinitesimal number of cases, compared with the "number of machines that there are and the years that they "have been working, of a band breaking when the machine has "not been under load—three or four cases at the outside. . . . "But the evidence in this case shows that there never has been "known a case in which the mere fracture of the band has ever "caused injury to an operative."

Similarly, Denning L.J. said: "Now it has been held by the "House of Lords that the object of section 14 is to save a man "from coming into contact with the machine, and not to save "him from pieces of material flying out, see *Nicholls* v. *Austin*,[36] "*Carroll* v. *Barclay*[37]: but this must be taken subject to this "qualification that, if it is known—or might reasonably be anticipated—that parts of the machine might fly out or break off "and do injury, then those parts are dangerous and must be "fenced, see *Dickson* v. *Flack*."[38]

Finally, Birkett L.J. said: "So what the learned judge did "—and it is conceded that he did so—was to state the law quite "accurately to himself and then apply the facts. As Denning "L.J. said, ultimately this is a question of fact. The judge, "with the evidence of the experts before him, and with what I "will call the evidence of the history of this machine also before "him, came to that clear conclusion; it never having happened "before in all that long history he came to the conclusion that "it was not reasonably foreseeable, and on that ground he said "that, most reluctantly, he was compelled to find for the defen"dants. I do not think that that judgment can be quarrelled "with, and I agree with the judgment of my Lords, Lord Goddard "C.J. and Denning L.J., that this appeal should be dismissed."

What is the conclusion of these cases upon which this court should act? It is, in our judgment, this: that by decisions of the court which it is our duty to follow, the speeches of the noble Lords in *Nicholls* v. *Austin*[39] should be treated as qualified to the extent (a) that section 14 of the Act of 1937 ought not now to be read as limited in scope solely to the prevention of a workman's getting into contact with moving parts of a machine but

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[36] [1946] A.C. 493.

[37] [1948] A.C. 477.

[38] [1953] 2 Q.B. 464.

[39] [1946] A.C. 493.

(b) that the duty imposed by the section comprehends the duty to protect workmen from injury caused by ejected or flying pieces of the machine itself (as distinct from injury caused by flying or ejected pieces of the material on which the machine is working); but that liability in such latter event will not arise save in cases which would have fallen within the scope of the rationes of the judgments of Wills and Wright JJ. in *Hindle* v. *Birtwhistle*[40]; in other words, that a part of a machine should not be regarded as "dangerous" within the language of the section unless the risk of injury can be fairly described as reasonably foreseeable in the ordinary course. After all, the word "dangerous" is an ordinary English word; and the question is, in our judgment, this, in the end of all: could one fairly and sensibly describe the relevant part of this machine as "dangerous" in the circumstances of the present case, that is, because the chances of the plaintiff's injury could be "foreseen," but only foreseen in the very limited sense which we have tried to formulate? In our judgment, if we have properly posed the question, the answer here is in the negative, and we conclude, therefore, with Winn J. (though our reasons may not be entirely the same as his) that the plaintiff's claim should fail.

We would add in conclusion the hope that, upon some occasion, the matter should be further considered in the House of Lords. The House alone can determine for the future guidance of the courts the extent to which (if at all) the speeches in *Nicholls* v. *Austin*[41] ought now to be regarded as qualified.

We venture also to add this: that if a part of a machine can properly be said to be dangerous within the meaning of section 14 (1) of the Factories Act by reason of its liability to eject injurious fragments when in operation (as would at any rate appear to be in accordance with common sense) then there would appear to be no logic (or common sense) in a statutory duty of protection confined to the case where the ejected fragments are part of the machine and excluding the case where the ejected fragment (no less injurious) happens to come from the object upon which the machine is working.

For the reasons we have stated we would dismiss this appeal.

Appeal dismissed with costs.
Leave to appeal granted.

Solicitors: *Evill & Coleman; Kenneth Brown, Baker, Baker & Co. for Gee & Edwards, Swansea.*

E. D.

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[40] [1897] 1 Q.B. 192.

[41] [1946] A.C. 493.

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Dec. 8, 9.

Diplock J.

1959
May 11,
12, 13;
June 5.

Ashworth J.

C. A.

1960
Feb. 16, 17,
18, 19;
March 28.

Sellers,
Ormerod and
Harman L.JJ.

TSAKIROGLOU & CO. LTD. *v.* NOBLEE THORL G.m.b.H. ALBERT D. GAON & CO. *v.* SOCIÉTÉ INTERPROFESSIONELLE DES OLÉAGINEUX FLUIDES ALIMENTAIRES.

Sale of Goods—C.i.f.—Route—"Usual and customary"—Customary route blocked—Availability of alternative route—Whether alternative route must be used.

Contract—Frustration—C.i.f. contract—Usual and customary route via Suez blocked—Whether performance "a thing radically different "from that which was undertaken by the contract"—Whether parties "must have made" contract on basis of continued availability of canal.

Contract — Performance — Customary manner — Time when manner customary.

"Shipment."

Contract — Frustration — Fact or law — Finding by jury or arbitrator regarding commercial or fundamental difference.

Fact or Law.

Arbitration—Special case—Findings of fact—Primary facts—Whether court bound by findings of fact.

By a written contract dated October 4, 1956, sellers in the first appeal agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Hamburg during November/December, 1956. On November 2, the Suez Canal was closed to navigation, but the goods could have been shipped round the Cape of Good Hope. The alternative route round the Cape of Good Hope was about three times as long, and freightage by this route far more costly. The sellers failed to ship the goods, and in arbitration proceedings, the umpire held that the sellers were in default and the appeal board upheld the umpire's award.

Diplock J. held himself bound by the finding of the appeal board that "the performance of the contract by shipping the goods on a "vessel routed via the Cape of Good Hope was not commercially or "fundamentally different from its being performed by shipping the "goods on a vessel routed via the Suez Canal."

By a written contract dated October 12, 1956, sellers in the second appeal agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Nice during October/November, 1956. By a further written contract dated October 31, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Marseilles during November, 1956.

The sellers similarly failed to ship the goods owing to the closure of the Suez Canal; and in arbitration proceedings they were held in default by the umpire, who was upheld by the appeal board. Ashworth J. held that a c.i.f. contract was not frustrated ipso facto if the usual or customary route was rendered impossible; and that the voyage round the Cape of Good Hope was not such as to render performance by that route a thing radically different from that which was contemplated by the contract.

On appeal:—

Held, (1) that a term that shipment should be via Suez should not be implied into the contracts (post, pp. 358, 368, 370).

(2) That the obligation of the sellers was not confined to shipping by a route usual and normal at the time of the contract; when the Suez route became unusable their duty was to put the goods on a vessel destined to the required port by a reasonable and practicable route if available (post, pp. 360, 367).

In re Sutro & Co. and Heilbut, Symons & Co. [1917] 2 K.B. 348; 33 T.L.R. 359 considered.

Per Harman L.J. Why it should be necessary to imply such words as "by the usual and customary route," I do not see (post, p. 369).

(3) That the shipment was not prevented by war or force majeure within the meaning of the contracts; placing the goods on board a vessel for the right destination was not prevented (post, pp. 359, 370).

(4) That although the route via the Cape involved a change in the method of the performance of the contract, it was not such a fundamental change from that undertaken under the contract as to entitle the sellers to say that the contract was frustrated (post, pp. 362, 367, 371, 372).

Dictum of Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham U. D. C.* [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L. applied.

Carapanayoti & Co. Ltd. v. *E. T. Green Ltd.* [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115 overruled.

Semble. That the finding of the arbitration tribunal in the first case that shipment via the Cape was not commercially or fundamentally different from shipment via the Canal was not binding on the court (post, pp. 363, 368, 372, 373).

Decisions of Diplock J., post, p. 325; [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45 and Ashworth J., post, p. 341; [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693 affirmed.

TSAKIROGLOU & CO. LTD. *v.* NOBLEE THORL G.M.B.H.

SPECIAL CASE stated by the Board of Appeal of the Incorporated Oil Seed Association.

By a contract in writing dated Hamburg, October 4, 1956, between the appellants, Tsakiroglou & Co. Ltd. of Khartoum as sellers, and the respondents, Noblee Thorl G.m.b.H. of Hamburg/Harburg as buyers, through agents, the sellers agreed to sell and the buyers to buy about 300 tons of Sudanese groundnuts in the shell basis 3 per cent. admixture new crop 1956/57 at £50 per 1,000 kilos including bags c.i.f. Hamburg. Shipment November/December, 1956, with payment cash against documents on first presentation for 95 per cent. of the amount of provisional invoice balance to be paid after the analysis on final invoice. The contract form was to be the Incorporated Oil Seed Association Contract No. 38 with arbitration in London, and that contract was signed by the Hamburg agents. On October 7, the Red Sea Shipping Co. (Sudan) in Khartoum wrote to the sellers confirming that they had reserved space for the sellers for 300 tons groundnuts for shipment to Hamburg in one of four specified vessels due to call into their agency at Port Sudan for Hamburg during November/December, 1956. On October 25, 1956, the sellers made application for and were granted authority to export 315 tons (5 per cent. more or less included) groundnuts from Port Sudan c.i.f. Hamburg at £50 per 1,000 kilos. On November 1, 1956, a warehouse receipt was given to the sellers for 300 tons Sudanese groundnuts in shell to be held to the sellers' order in warehouse Port Sudan. On October 29, 1956, the Israelis invaded Egypt; on November 1, Britain and France commenced military operations and on November 2, the Suez Canal was blocked by block ships. On December 7, the sellers in a letter to the London agents requested them to advise the buyers that the Suez Canal was unlikely to be clear before the end of the shipment period and in that event they claimed an extension of time under clause 6 of the contract. On December 18, the buyers refused the extension. On January 7, 1957, the buyers claimed arbitration, and on January 9 the buyers gave notice of intention to buy in against the sellers. Arbitrators appointed by both parties having failed to agree they appointed an umpire who, by an award dated February 20, 1957, awarded that the sellers were in default and should pay to the buyers as damages the sum of £5,625 together with £79 15s. cost of the award. The sellers being dissatisfied with the award gave notice of appeal and a Board of Appeal was appointed to hear the appeal on January 28, 1958. The Board of Appeal dismissed the appeal and upheld the umpire's award.

The relevant terms of the contract and findings of the Board of Appeal are fully set out in the judgment of Diplock J.

Eustace Roskill Q.C. and *R. A. MacCrindle* for the sellers. The arbitrators have found in paragraph 12 (vi) of the case that shipment via the Cape was not commercially or fundamentally different from performance via the Suez Canal. This finding makes no difference. In *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[1] there was no such finding and it was held as a matter of law that performance via the Cape was fundamentally different. There, the sellers succeeded on the ground of frustration and on the true construction of the exception clause. Once the Canal was closed it was likely to remain so throughout the shipment period, and both parties were relieved of all further obligations. Further, the sellers are protected by the exception clause in the contract which provides that if import or export be prohibited the contract shall be extended for a period not exceeding two months. The buyers claimed arbitration during the currency of this extension period and are not therefore entitled to claim that the sellers were in default.

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[1] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

At the date of the contract both parties contemplated shipment through the Canal and it would have been unusual and rare for shipment to be made via the Cape. There is no finding that the Cape ever became the normal and usual route. In *Green's* case [2] it was described as an emergency route, and this would be an accurate description of it. Every word of the last two and a half pages of the judgment of McNair J.[3] is adopted in the present case. If that decision is right, the only question left is whether the sellers can escape the arbitrators' finding that performance via the Cape was not commercially or fundamentally different from performance via the Suez Canal. The finding makes no difference when deciding whether a c.i.f. seller's obligations can only be performed by a route usual and customary at the date of the contract. In *Green's* case the judge decided the point against the sellers, but he was influenced by *Upjohn* v. *Hitchens*,[4] which, when analysed, does not support the proposition. The highest the case can be put against the sellers is that the goods could have been transported via the Cape to Hamburg, but that is immaterial.

On the question of frustration reliance is placed on *Krell* v. *Henry*,[5] *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[6] and *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*[7] It does not matter what causes frustration. The sellers cannot tender a document which at the date of the tender cannot convey to the buyer a valid and enforceable right against the shipowner. Here the facts show that the buyers contemplated performance on a Suez Canal bill of lading. Whether

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[2] [1959] 1 Q.B. 131.

[3] [1959] 1 Q.B. 131, 147 et seq.; [1958] 3 W.L.R. 390, 398 et seq.

[4] [1918] 1 K.B. 171; 34 T.L.R. 79.

[5] [1903] 2 K.B. 740; 18 T.L.R. 823.

[6] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[7] [1916] 1 K.B. 495; 32 T.L.R. 186.

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something is fundamental is a question of law: *Port Line Ltd.* v. *Ben Line Steamers Ltd.*[8] A lay tribunal cannot defeat the unrestricted right of the court: *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[9] What is relevant is what the parties contemplated at the time; what is irrelevant is the finding of fact that there was no commercial difference between performance one way and performance the other: *In re Comptoir Commercial Anversois and Power, Son & Co.*[10] It is obvious from this case that lay opinion is anti-frustration. *Mehmet Dogan Bey* v. *G. G. Abdeni & Co. Ltd.*[11] is the latest authority on the power of the court to review mixed fact and law.

There is a curious absence of direct authority as to the sellers' obligation as regards route. The crucial point is whether one construes the obligation as arising at the time of the contract or at the date of performance. McNair J. was wrong in *Green's* case [12] because he allowed himself to be influenced by the citation from *Upjohn* v. *Hitchens.*[13] In the absence of express terms in the contract one has to follow the customary route. Where there is a usual and customary route it must be treated as written into the contract so that it becomes as if stated in terms: "via the "Suez Canal." The court has a free field in deciding whether to construe by reference to the time of contract or date of performance. *Upjohn* v. *Hitchens* [14] and *Postlethwaite* v. *Freeland* [15] are distinguishable.

As regards the exception clause, *Fairclough, Dodd & Jones Ltd.* v. *J. H. Vantol Ltd.*[16] is not conclusive, but very helpful. "Shipment" means either performance by shipping or intended shipment. Nothing requires the court to limit shipment to the narrow physical act of shipping. *Fairclough's* case [16] shows that in considering an extension clause the House of Lords, following McNair J., treated the clause as protecting the seller where he was delayed in fulfilling in the very way in which he intended to fulfil, namely, via Suez.

John Megaw Q.C. and *J. F. Donaldson* for the buyers. Freights having risen the sellers want to avoid their obligation. It was possible to obtain the goods, ship them and send them to their contractual destination. The Board of Appeal applied the

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[8] [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; [1958] 1 All E.R. 787.

[9] [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145.

[10] [1920] 1 K.B. 868.

[11] [1951] 2 K.B. 405; [1951] 2 T.L.R. 30; [1951] 2 All E.R. 162.

[12] [1959] 1 Q.B. 131, 146; [1958] 3 W.L.R. 390, 397.

[13] [1918] 1 K.B. 171.

[14] Ibid.

[15] (1880) 5 App.Cas. 599.

[16] [1957] 1 W.L.R. 136.

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canons of common sense and business decency. On the findings of fact this case is very different from *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[17] The argument on frustration is put on three grounds: (i) a technical point; (ii) the finding of the Board of Appeal in paragraph 12 (vi) is a finding of fact and is such that a court of law can only give one answer to the question of law which arises, and that answer is that the contract was not frustrated; (iii) if it were right to disregard paragraph 12 (vi), the court would still be bound to come to the same decision as the Board of Appeal. This third point may involve the proposition that the decision in *Green's* case is wrong, since, if the finding in paragraph 12 (vi) be disregarded, there is probably no material distinction in the facts of the two cases.

As to (i), frustration is alleged by the sellers and dealt with by the Board of Appeal as having taken place on November 2, 1956. There is no evidence showing that on November 2 it would have been reasonable to anticipate that the Suez Canal was going to remain closed until the end of the shipment period. As to (ii), the finding of the Board of Appeal in paragraph 12 (vi) is a finding of fact and as such is conclusive and binding. The authorities on the question of frustration for the purpose of deciding what are the functions of judge and jury (and equally of court and arbitrator, as regards questions of fact) are *Jackson* v. *Union Marine Insurance Co. Ltd.*,[18] *Bank Line Ltd.* v. *Arthur Capel & Co.*[19] and *In re Comptoir Commercial Anversois and Power, Son & Co.*[20] The importance of the alteration from the Suez Canal to the Cape route as a commercial venture was a question of fact, and a finding on that question of fact is one which will conclude the question, or, at the lowest, will assist the court materially in coming to a conclusion as to the proper implied term of this contract. The finding in paragraph 12 (vi) was just such a finding. *British Launderers' Research Association* v. *Borough of Hendon Rating Authority*[21] shows that there are primary and secondary facts and deals with the conclusions that are to be founded thereon. The question of time required to bring about frustration is a matter of fact for the arbitrators to decide: *Universal Cargo Carriers Corporation* v. *Citati.*[22] As to (iii), the decision of McNair J. in *Green's* case[23] is wrong. It is apparent that if

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[17] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390.

[18] (1874) L.R. 10 C.P. 125.

[19] [1919] A.C. 435; 35 T.L.R. 150.

[20] [1920] 1 K.B. 868.

[21] [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21.

[22] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.

[23] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390.

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McNair J. were right, lawyers would be taking a different view from the commercial men. If paragraph 12 (vi) is to be disregarded or is not conclusive for this purpose, one has to ask oneself: what is the test which the Board of Appeal should have applied to the facts they have found? Three questions were posed by McNair J. in *Green's* case.[24] The first one is based on Lord Radcliffe's speech in *Davis Contractors Ltd.* v. *Fareham Urban District Council*,[25] where he says: "There must be as "well such a change in the significance of the obligation that "the thing undertaken would, if performed, be a different thing "from that contracted for." If Lord Radcliffe is right, then the Board of Appeal have put the right test. The second question posed by McNair J. in *Green's* case [26] is: "Was the closure of "the Suez Canal a circumstance fundamental enough to transmute the sellers' obligation into an obligation of a different kind, "which the contract did not contemplate, and to which it could "not apply?" If those final words are given their full weight, the test has only to be stated to see that in the present case the contract for the sale of goods would still apply. As to McNair J.'s third question, there does not appear to be anything in the judgment of Lord Radcliffe in *Davis's* case [27] to support that test. In the present case the first test based on Lord Radcliffe's speech [28] should apply.

It is suggested that shipment via the Cape is different from shipment via Suez. The possible differences are, first, that there might be a greater difficulty in obtaining shipping space. As to that, there is a finding of fact in *Green's* case that there were no difficulties in obtaining shipping space via the Cape. Secondly, there is the possible increase in freight charges, but McNair J. in *Green's* case [29] said that that would not, of itself, make a material difference. Whether the change of route imports different obligations as to the condition of the goods upon shipment is a question of fact, and it could not properly be held that such a difference exists or that it is fundamental unless there were evidence and a finding to that effect by the tribunal of fact—the arbitrators. It is submitted that it would be wrong for the court to hold, without evidence, that there is, in general, a fundamental difference in this respect between shipments via Suez or via the Cape. If it is suggested that there be such a difference, it is a matter for evidence in relation to the particular type of cargo and the facts of the particular case. The Board of Appeal applied the right test and were right in deciding that there was no fundamental difference between the two methods of performance. A judge is only entitled to draw an inference of fact if it is necessary and obvious: *Universal Cargo Carriers Corporation* v. *Citati (No. 2)*.[30]

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[24] [1959] 1 Q.B. 131, 148.

[25] [1956] A.C. 696, 729.

[26] [1959] 1 Q.B. 131, 148; [1958] 3 W.L.R. 390, 399.

[27] [1956] A.C. 696.

[28] Ibid. 729.

[29] [1959] 1 Q.B. 131, 148; [1958] 3 W.L.R. 390, 399.

The sellers made the point that there should be implied into this contract a term that the shipment was to be by the usual and customary route at the date of the contract.

[DIPLOCK J. For the reasons which he gives, excluding his reliance on *Upjohn* v. *Hitchens*,[31] I think that McNair J. has dealt with that point in *Green's* case.]

As to the point on clause 6 of the contract, " shipment " in that clause means placing the goods on board: *In re Comptoir Commercial Anversois and Power, Son & Co.*[32] *Fairclough, Dodd & Jones Ltd.* v. *J. H. Vantol Ltd.*[33] is of no assistance on this point.

Roskill Q.C. replied.

1958. Dec. 9. DIPLOCK J. This is a case stated by the Board of Appeal of the Incorporated Oil Seed Association (which I shall call the I.O.S.A.); and it is yet another of the Suez cases. On October 4, 1956, the sellers, the appellants here, who are a company incorporated and resident in Khartoum, agreed to sell to the buyers, who are a company incorporated in Western Germany and resident in Hamburg, 300 tons of Sudanese groundnuts in the shell at £50 per 1,000 kilos c.i.f. Hamburg; shipment November/December, 1956, cash against documents modified in a respect material for the purposes of this case.

The contract terms were those of the I.O.S.A. Contract No. 38 which is headed: " Contract for West African Groundnuts in " the Shell." The printed terms relate to shipment from a West African port and a particular kind of charterparty. Clause 3 provides: " . . . Sellers shall insure goods against war risks on " usual Lloyd's conditions but sellers' obligation in this respect " shall be limited to the terms and conditions in force and " generally obtainable in London at time of shipment. . . ." Clause 5, of which I need only read part: " Name of steamer " (or steamers) to be declared not later than date of sailing, but

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[30] [1958] 2 Q.B. 254; [1958] 3 W.L.R. 109; [1958] 2 All E.R. 563.

[31] [1918] 1 K.B. 171.

[32] [1920] 1 K.B. 868.

[33] [1957] 1 W.L.R. 136.

"not sooner than 15 days prior to the first day of the stipulated "period of shipment and if the steamer named, before loading, "is lost or suffers damage causing the cancelment of the charter-"party the seller shall have an extension of two months from the "official advice of the loss or cancelment to carry out the con-"tract by another vessel. . . ." Clause 6, on which the sellers specifically rely: "In case of prohibition of import or export, "blockade or war, epidemic or strike, and in all cases of force "majeure preventing the shipment within the time fixed, or the "delivery, the period allowed for shipment or delivery shall be "extended by not exceeding two months. After that, if the "case of force majeure be still operating, the contract shall be "cancelled."

Finally, a portion of clause 10, the default clause: "In default "of fulfilment of contract by either party the other party at his "discretion shall, after giving notice in writing, have the right "to sell or purchase, as the case may be, against the defaulter "who shall make good the loss, if any, on such sale or purchase "on demand. . . ."

That contract being entered into on October 4, 1956, on October 7 the sellers booked space for 300 tons of groundnuts to be shipped to Hamburg in one of four vessels scheduled to call at Port Sudan in November and December, 1956. On October 25, 1956, the sellers got an export permit for the necessary quantity of groundnuts and on November 1, 1956, 300 tons of groundnuts in warehouse at Port Sudan were held to their order. The Suez Canal was nationalised on July 26, 1956, long before this contract was entered into. The Israeli forces began military operations against Egypt on October 29, 1956. The British and French forces began military operations against Egypt on November 1, 1956. Port Said was captured on November 5, 1956, and there was a cease fire on November 6, 1956. The Suez Canal was blocked on November 2, 1956, and, as a matter of history, remained closed to shipping until April 9, 1957.

On December 7, 1956, after the Canal was blocked, but before the shipping period had expired, the sellers claimed an extension under clause 6. On December 18 the buyers refused the extension. On January 7, 1957, the buyers claimed arbitration, and on January 9, 1957, the buyers gave notice of intention to buy in against the sellers under the default clause, that is to say, they elected to treat the contract as rescinded by the sellers' wrongful repudiation by breach of condition in not shipping within the contract period, November/December, 1956.

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Diplock J.

The Appeal Board of the I.O.S.A., upholding the umpire, who awarded the buyers £5,625 damages, held that the buyers were entitled to do so. There are a number of relevant findings of fact which I must read. "1. Sudanese groundnuts are "harvested at the end of October or beginning of November and "the customary port for shipment of such groundnuts is Port "Sudan. All groundnuts exported from Sudan to Europe are "shipped from Port Sudan which is the only suitable port." No port of shipment was mentioned in the contract, but it is conceded by both sides that by necessary implication on that finding of fact Port Sudan was the contemplated port and contractual port of shipment. Finding of fact No. 2 is: "At the "date when the contract was entered into the usual and normal "route for the shipment of Sudanese groundnuts from Port Sudan "to Hamburg was via the Suez Canal. It would be unusual "and rare for any substantial parcel of Sudanese groundnuts "from Port Sudan to Europe to be shipped via the Cape at all "times when the Suez Canal was open." Paragraph 6: "The "closure of the Suez Canal prevented transport of the contract "goods from Port Sudan to Hamburg via the Suez Canal and "the impossibility of transportation by that route continued until "April, 1957. The sellers could have transported the goods "from Port Sudan to Hamburg via the Cape during November "or December, 1956. 7. The distance from Port Sudan to "Hamburg via the Suez Canal is approximately 4,386 miles and "the distance from Port Sudan to Hamburg via the Cape of Good "Hope is approximately 11,137 miles. The distance from Port "Sudan to Suez is 694 miles. 8. The freight ruling at the time "of the contract for the shipment of groundnuts from Port Sudan "to Hamburg via the Suez Canal was about £7 10s. per ton. "After the closure of the Canal the Port Sudan-U.K. Conference "imposed the following surcharges for goods shipped on vessels "proceeding via the Cape of Good Hope, viz., as from November "10, 1956, 25 per cent., and as from December 13, 1956, 100 "per cent." Paragraph 10: "At the date when the contract "was made both parties contemplated that shipment would be "made via the Suez Canal."

In addition to these findings of fact there are mixed findings of law and fact, and those that I need read at the moment are in the following terms: "12. (iv) It was not an implied term of the "contract that shipment or transportation should be made via "the Suez Canal. (v) The contract was not frustrated by the "closure of the Suez Canal," and, finally, subparagraph (vi):

"The performance of the contract by shipping the goods on a "vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by "shipping the goods on a vessel routed via the Suez Canal."

It is conceded that, although slightly different in wording, these findings of fact and of mixed law and fact are substantially the same as those in the case stated which was the subject of the decision in *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[1] (which I shall hereafter call *Green's* case), and decided as recently as July 18, 1958. There is, however, one important difference; finding No. (vi) was not present in *Green's* case. In *Green's* case [1] McNair J. held that a contract not differing in any material respect from the present, except for the finding corresponding to subparagraph (vi), was frustrated by the blocking of the Suez Canal. The crucial question in this case, in my view (though there are others to deal with), is whether finding No. (vi) makes this case distinguishable from *Green's* case,[1] although, if it does not, the buyers invite me not to follow McNair J.'s decision.

One point, since it goes to the argument on frustration as well as to the argument on subparagraph (vi), I can deal with first and shortly. This is a contention of the sellers that in a c.i.f. contract it is an implied term that shipment shall be via a route which is at the date of the sale contract a usual and customary route, and, if there is at that date only one usual and customary route, by that route. Here there is a finding of fact that the usual and normal route was via Suez and that was the only usual and normal route. The contract, therefore, the sellers argue, must be read as if the words "via Suez" were inserted after the word "shipment" and before the words "November/December, 1956." There is no direct authority for this proposition. So far from its being a necessary implication, it seems to be one which any business man would reject. I am prepared to echo the following passages in McNair J.'s judgment in *Green's* case where he says [2]: "In principle, it seems to me that where a contract "expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried "out in a customary manner, the performance must be carried "out in a manner which is customary at the time when the "performance is called for. This is particularly so in the case of "forward contracts like many c.i.f. contracts which call for performance at some future date, when one bears in mind that in

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[1] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[2] [1959] 1 Q.B. 131, 145; [1958] 3 W.L.R. 390, 396, 397.

"mercantile matters custom and usage are subject to rapid "change: . . . For example, in times of strained international "relations the customary form of bills of lading may change by "the universal acceptance of a particular form of war-risk protection. Can it be said that the seller is bound to tender the form "of bill of lading which was customary at the date of the contract "when, by the time when performance has arrived, that form has "been supplanted by another customary form? I think not." Then he says, lower down[3]: "In my opinion, as a matter of "principle, the sellers' obligation under a contract such as this "where no route is specified is not confined to shipping by a "route which was a usual and customary route at the date of the "sale contract, but is to ship by a route usual and customary at "the time of performance." In the following passage McNair J., who had not had the advantage of a closer examination into *Upjohn* v. *Hitchens*[4] which I have had, fortifies his opinion by the observations of Roche J. in *Upjohn* v. *Hitchens*.[5] I do not rely upon that as fortifying my conclusion. I am satisfied with the fortification that McNair J.'s view on this topic agrees with mine.

I now turn to frustration, remembering that frustration is not to be lightly held to have occurred as it puts an end to a contract independently of the volition of the parties at the time of the frustrating event, and it may be, without either party being conscious that what has happened has snapped their contractual bonds. The case books are full of reports of cases where lay arbitrators have found contracts to be frustrated and the court has held that they were wrong. Lawyers have ever been more prone than merchants to cling to the letter of the contract; see, for example, *Shylock* v. *Antonio*, a case which might have been decided on grounds of public policy but, in fact, turned on a pure question of construction. *Green's* case[6] is one of the very few cases, if it is not unique, where trade arbitrators have found a contract not to be frustrated and the court has found that it was. I should be very reluctant, particularly in the Commercial Court, to come to a different conclusion of law from that reached by McNair J. in the same court as recently as last July, if I thought that the facts with which I am confronted were indistinguishable from those with which he was confronted in *Green's* case.[6] The

[3] [1959] 1 Q.B. 131, 146.

[4] [1918] 1 K.B. 171; 34 T.L.R. 79; [1918] 2 K.B. 48, C.A.; 34 T.L.R. 412.

[5] [1918] 1 K.B. 171, 179.

[6] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390.

Appeal Board's finding in paragraph 12 (vi) seems to me to be a vital difference. That finding I repeat: "The performance of the "contract by shipping the goods on a vessel routed via the Cape "of Good Hope was not commercially or fundamentally different "from its being performed by shipping the goods on a vessel "routed via the Suez Canal." It makes a vital difference, of course, only if it is, or at any rate includes, a finding of fact and is not a mere finding of law.

This brings one really to the question: What are the respective provinces of the judge and the jury in a frustration case? In other words, how should this case be summed up to a jury? What is the question on which they should be invited to bring in a special verdict? There are certain findings of fact which are common to the present case and to *Green's* case,[7] and which are undisputedly pure questions of fact and which, in the illuminating analysis of Denning L.J. in *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[8] would be called "primary facts." The most important of them are: (1) At the time of the contract buyers and sellers would assume that the goods would be shipped via Suez. (2) The voyage round the Cape was about two and a half times the length of the voyage via Suez, which would, in a 10- to 11-knot steamer take nearly seven weeks, instead of somewhat under three weeks or correspondingly shorter periods in faster vessels. It would involve two crossings of the Equator and a passage through the Southern Hemisphere in summer; the freight rate in *Green's* case was £6 10s. out of the total c.i.f. price of £28 15s., and in the present case, £7 10s. out of the c.i.f. price of £50 would have been 25 per cent higher from November 10, and 100 per cent. higher from December 13. On those facts, undoubtedly, a jury could come to the conclusion, I think, as McNair J. did, that the contract was frustrated by the blocking of the Suez Canal.

What I have to decide is whether on those facts a jury should be directed as a matter of law to find frustration, or whether there is a further conclusion to be drawn from those facts which can as well be drawn by a layman properly instructed on the law as by a lawyer, and which is, therefore, a conclusion of fact for the tribunal of fact (see the *British Launderers'* case[9]). I think that clearly there was and that, despite all the water that has flowed under the bridge since *Jackson* v. *Union Marine Insurance Co.*

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[7] [1959] 1 Q.B. 131.

[8] [1949] 1 K.B. 462, 471; 65 T.L.R. 103; [1949] 1 All E.R. 21.

[9] [1949] 1 K.B. 462, 471.

Ltd.[10] was decided, it can today be phrased as simply as the question that was left to the jury by Brett J.[11] in *Jackson's* case and approved in 1874 by the strong Court of Exchequer Chamber, most of whose members had long experience of the pre-Judicature Act procedure under which special verdicts were obtained from juries at nisi prius, and argument as to the consequences of such special verdicts was subsequently conducted before the common law court in banc. The question in that case was left to the jury in these terms: Whether the time necessary to get the ship off and repairing her, so as to be a cargo-carrying ship, was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and the charterers? With the greatest respect to everything that has been said since, including some criticism by Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co.*,[12] I do not think that in a case of this kind that question or one analogous to it can be improved upon as a question to be put to the jury, and I would note in passing that Lord Sumner's criticism, to which I have referred, was that it made it too easy for a jury to find frustration, not too difficult. That question, I think, is a question of fact and, where it is answered, the answer is a conclusion of fact found by the jury. It is a finding of fact of the utmost relevance in answering the ultimate question of law: " Was the contract frustrated? " in whichever of the anthology of phrases you care to select as the best way of posing that ultimate question of law. As McNair J. said in *Green's* case[13]: " It is the function of the court to determine, as " a matter of law, whether frustration arises on the court's " appreciation of the facts found and of the legitimate inference " to be drawn from such facts." The legitimate inferences to be drawn from the facts found include any conclusions of fact and, in the absence of any finding by the arbitrators in *Green's* case, that " the performance of the contract by shipping the goods on a " vessel routed via the Cape of Good Hope was not commercially " or fundamentally different from its being performed by shipping " the goods on a vessel routed via the Suez Canal," it was a conclusion of fact which it was open to the judge to draw from the facts that were found in *Green's* case that performance by shipping via the Cape was commercially and fundamentally different from a performance by shipping via Suez. McNair J.

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[10] (1874) L.R. 10 C.P. 125.

[11] (1873) L.R. 8 C.P. 572.

[12] [1919] A.C. 435, 460; 35 T.L.R. 150.

[13] [1959] 1 Q.B. 131, 148; [1958] 3 W.L.R. 390, 399.

did, I think, apply his mind to precisely that question of fact and drew the inference [14] that the circumstances of the longer and different route of transport would involve or might involve the seller in quite different obligations as to the condition of the goods on shipment from that involved in a shipment via the canal.

I do not think it is necessary for my purpose to express any view on the argument addressed to me by Mr. Megaw as to whether that was a conclusion of fact which could legitimately be drawn without some further findings of fact by the arbitrators as to the qualities and character of the goods and the effect of a longer shipment on them. But I am faced with quite a different problem from that with which McNair J. was faced. I have a finding of fact, or, to use the jury analogy, a special verdict, that "the performance of the contract by shipping the goods on a "vessel routed via the Cape of Good Hope was not commercially "or fundamentally different from its being performed by shipping "the goods on a vessel routed via the Suez Canal." If that finding were unassailable, then, in my view, it follows that the contract was not frustrated. To each of the three questions put in *Green's* case [15]: "(1) Must the parties have made their bargain "on the basis that, if the Canal was no longer available when "the sellers elected to perform, the contract would be off?"; or "(2) Was the closure of the Suez Canal a circumstance fundamental enough to transmute the sellers' obligation into an "obligation of a different kind, which the contract did not "contemplate, and to which it could apply?"; or "(3) Would "the answer to the 'officious bystander' have been: 'Of course, "'if the Canal is closed after November 2, the contract is "'off'?"; if that finding of fact is unassailable, the answer must be "No."

The question with which I am confronted is: Can that finding by the Appeal Board stand? In the case of a jury a special verdict of this kind could be assailed on two grounds. First, that there was no evidence that could reasonably support it, and secondly, that they had been misdirected as to the meaning of the question on which they had brought in a special verdict. In the case of a trade arbitration such as this where the Appeal Board consists of persons familiar with the trade, the first ground does not arise. The Appeal Board are entitled to use their personal knowledge or expertise in arriving at conclusions of fact. They are not limited to the evidence of witnesses called before them. As regards the second ground, in an arbitration this really amounts to showing that the Appeal Board have misdirected themselves as to the meaning of their finding. Their finding is expressed in very simple language which any judge might do well to emulate, and which he would have to do if we went back to juries in frustration cases. The only words as to the meaning of which the Appeal Board could possibly have directed themselves are those in the phrase "commercially or fundamentally different," and I should have thought that the adverb "commercially," at any rate, is one that commercial men like this Appeal Board could readily understand. They had directed their minds to the right contract, a contract for the sale of goods of which shipment and carriage from Port Sudan to Hamburg was but an incident, although no doubt an essential incident. And unless I am to assume that they have misunderstood the simple words "com-"mercially or fundamentally different," they have found that in the particular trade—that is the trade in Sudanese groundnuts—the sellers' obligations as to the condition of the goods on shipment are not materially different if a shipment is via the Cape instead of via Suez, and that the delay in arrival in Hamburg involved in the longer shipping route, at any rate, under a contract which gives a two months' shipping period, does not make it a different kind of contract from that contemplated when it was entered into.

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[14] [1959] 1 Q.B. 131, 149.

[15] [1959] 1 Q.B. 131, 148; [1958] 3 W.L.R. 390, 399.

I see no ground on which I can set aside or ignore this finding, which I regard as a conclusion of fact. I think that its presence in the case stated constitutes a crucial difference between the facts of this case and those of *Green's* case. I therefore hold that the Appeal Board was right in law in deciding that the contract was not frustrated by the closing of the Suez Canal.

I can deal shortly with the remaining point in the case, which is: Did clause 6 of the contract entitle the sellers to an extension of time for shipment? The findings, whether they be of fact or law, which are relevant to this issue are findings subparagraphs (i), (ii) and (iii) of paragraph 12. They were as follows: "(i) There were hostilities but not war in Egypt at "the material time. (ii) Neither war nor force majeure pre-"vented shipment of the contract goods during the contract "period if the word 'shipment' means placing the goods on "board a vessel destined for the Port of Hamburg. (iii) If "the word 'shipment' includes not only the placing of the "contract goods on board a vessel but also their transportation "to the contract destination then shipment via the Suez Canal "was prevented during the contract period of shipment by "reason of force majeure but shipment via the Cape was not "so prevented." The only question of law is: Does "the "shipment" in clause 6 mean shipment via Suez, i.e., not merely placing the goods on board a vessel, but also carrying them by that route to the port of destination, or does it mean placing the goods on board a vessel destined for the Port of Hamburg by whatever route? I have already held that as a matter of construction the words "shipment via Suez" cannot be read into the contract. "Shipment" in clause 6 means any shipment which satisfies the terms of a contract and thus includes, after the blocking of the Suez Canal, shipment via the Cape. The word "shipment" I hold as a matter of construction means, and means only, placing the goods on board: see *In re Comptoir Commercial Anversois and Power, Son & Co.*,[16] where Bailhache J., in a passage which was approved, I think, by all the members of the Court of Appeal, said this: "Now, if I give to the "word 'shipment' the widest meaning of which it is capable, "it cannot mean more than bringing the goods to the shipping "port and then loading them on board a ship prepared to carry "them to their contractual destination."

Mr. Roskill has, however, one further string to his bow. He contends in the alternative that "the shipment" means "the "intended shipment," and there is a finding of fact that space had been reserved on vessels to sail in the contract period via Suez. The clause appears to me to be perfectly intelligible and perfectly sensible without reading into it a word that is not there, and I for one decline to do so.

The question put was: Whether on the true construction of the contract and the facts found the sellers were in default? To that question I answer "Yes," with the consequence that the appeal fails.

C. J. E.

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Albert D. Gaon & Co. v. Société Interprofessionelle des Oléagineux Fluides Alimentaires.

ALBERT D. GAON & CO. *v.* SOCIÉTÉ INTERPROFESSIONELLE DES OLÉAGINEUX FLUIDES ALIMENTAIRES.

SPECIAL CASE stated by the Committee of Appeal of the Incorporated Oil Seed Association.

By a contract in writing dated October 12, 1956 (hereinafter referred to as "the first contract"), between the appellants, Albert D. Gaon & Co., of Sudan, as sellers, and the respondents, the Société Interprofessionelle des Oléagineux Fluides Alimentaires, as buyers, through agents, the sellers agreed to sell and the buyers to buy about 1,500 tons of Sudan groundnuts in shell 1955/56 crop at £49 10s. per ton c.i.f. Nice, shipment October/November, 1956. By another contract in writing dated October 31, 1956 (hereinafter referred to as "the second contract"), the sellers agreed to sell and the buyers to buy about 1,000 tons of Sudan groundnuts in shell 1955/56 crop at £54 5s. per ton c.i.f. Marseilles, shipment November, 1956.

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[16] [1920] 1 K.B. 868, 878.

Form No. 38 of the Incorporated Oil Seed Association Forms of Contract (hereinafter called "I.O.S.A. Contract No. 38") was incorporated in both contracts. Clause 1 of I.O.S.A. Contract No. 38 provided for "Shipment from a West African port . . . by "steamer or steamers (tankers excluded) direct or indirect with or "without transhipment." It was found as a fact in the case stated that both parties intended that the words "Sudanese port" should be substituted for "West African port." Clause 8 of I.O.S.A. Contract No. 38 provided: "In case of prohibition of "import or export, blockade or war, epidemic or strike, and in all "cases of force majeure preventing the shipment within the time "fixed, or the delivery, the period allowed for shipment or delivery "shall be extended by not exceeding two months. After that, if "the case of force majeure be still operating, the contract shall "be cancelled."

No goods were shipped under either of the contracts, the sellers claiming that they were prevented from doing so by events which had occurred in the Middle East (details of which are set out in the judgment). Disputes thereupon arose under both contracts between the sellers and the buyers, which were referred to arbitration in accordance with the rules of the Incorporated Oil Seed Association (hereinafter referred to as "the association"). Arbitrators appointed by both parties having failed to agree, they appointed an umpire who, by two awards dated October 23, 1957, awarded that the sellers were in default under both contracts, and should pay to the buyers as damages for the said default the difference between the contract price in each case and a price of £62 5s. per ton, together with interest at 5 per cent. from the date of the awards. The umpire also directed that the fees of the association and the arbitrators should be paid by the sellers. The sellers, being dissatisfied with the awards, appealed to the

Board of Appeal of the association in accordance with the association's rules. The Board of Appeal, who made their award in the form of a special case, held that the sellers were in default under both contracts, confirmed the umpire's award, and further directed that the sellers should pay the costs of the appeal.

By their award, the Board of Appeal found that the customary port for shipment of Sudan groundnuts was Port Sudan, and that the distance from Port Sudan to Marseilles and Nice via the Suez Canal was approximately 2,300 miles, and via the Cape of Good Hope was 10,500 miles. They further found that the basic freight ruling at the date of the contracts, for shipment of groundnuts from Port Sudan to the contract destinations, was about £6; but that following the closing of the canal to navigation a surcharge of from £21 9s. to £23 per ton was imposed during the period between November 9, 1956, and May 7, 1957. The other relevant findings of the Board of Appeal are fully set out in the judgment of Ashworth J.

It was contended by the sellers that the contracts were frustrated by reason of the chaotic shipping situation which they alleged prevailed as a result of the closure of the Suez Canal, and also that by reason of that situation shipment was prevented by force majeure within the meaning of clause 8 of I.O.S.A. Contract No. 38. His Lordship held that the facts found in the case stated, together with the documents annexed thereto, established the contrary of those two contentions, and the case is not reported upon these points.

Eustace Roskill Q.C. and *R. A. MacCrindle* for the sellers. In respect of the first contract, the present case is indistinguishable from *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*,[1] although there may be a distinction in the case of the second contract. *Carapanayoti's* case [1] was rightly decided. In both that case and *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.*[2] the point was taken that it was an implied term of a c.i.f. contract that shipment should be by the route which was usual and customary at the time of the contract, and since the blockage of Suez rendered this route impossible the contract was frustrated. The rejection of this contention was wrong, and the point is reserved. It is also submitted that the sellers are entitled to rely on the exceptions clause, since "shipment" there means shipment by the usual or customary route, namely, Suez.

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[1] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[2] [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45.

There remains the issue of frustration. It was an implied term of these contracts that at the time when the sellers chose to ship the goods the Suez Canal would be available. The enforcement of the contract after the closure of the Canal would be the enforcement of a different contract. If parties contract on the basis of a tacit assumption that some basic fact will continue to exist, and that fact is destroyed by a supervening event, then that destroys the contract itself. It was a basic assumption of the parties that the Suez Canal would continue to be available throughout. [Reference was made to *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Commissioners of H.M. Works and Public Buildings.*[3]] The facts here are far stronger than in *Carapanayoti's* case,[4] where the contract was c.i.f. Belfast, or in *Tsakiroglou's* case,[5] where it was c.i.f. Hamburg. Where the contract is to ship from Port Sudan to a Mediterranean port, the distance of the journey round the Cape of Good Hope, involved by reason of the closure of the Canal, is about four times as great as that of the ordinary route, and this is more than a mere difference of degree. There is nowhere in the case a finding that any closure of the Canal was contemplated; and there is no finding that the route via the Cape ever became a usual or customary route; it is plain that that route was only an emergency route. The Board of Appeal have not found that there was any route, other than that via Suez, which was usual or customary on October 31. [Reference was made to *S.S. Matheos (Owners)* v. *Louis Dreyfus & Co.*[6]] They found that the usual route on October 12 was via Suez. There is no finding as such of a usual route on October 31, but there is no finding of any change, and the inference is that Suez was still the usual route. There is a finding that on October 31 the parties knew or ought to have known of the Israeli invasion, but there is no finding that they ought to have known of or contemplated the closure of the Canal. There is no finding that the parties knew or ought to have known that shipping facilities via the Canal had come to a standstill. The finding in paragraph 26 (*b*) of the case that performance by shipment via the Cape would not have been commercially impossible is limited by its construction to the question only of the rise in freights which occurred.

Under these contracts the sellers' obligation was to procure a contract for the goods to be carried by the usual or customary route from Port Sudan to Nice and Marseilles respectively. If the date at which this route is to be determined is the date of performance, then reliance is placed upon the absence of any finding that the Suez Canal had ceased to be the usual or customary route, and the absence of any finding that any other route had become usual or customary. Accordingly, since this route was blocked, the contracts were frustrated; even if not frustrated immediately, they became so, since no other route became usual or customary within the time limited for performance. In *Davis Contractors Ltd.* v. *Fareham Urban District Council*[7] Lord Radcliffe said that frustration occurred whenever the law recognised that without default of either party a contractual obligation had become incapable of being performed because the circumstances in which performance was called for would render it a thing radically different from that which was undertaken by the contract. Performance here would have been a radically different thing; first, because of the greatly increased expense of the voyage; secondly, because of its much greater distance; thirdly, because of its changed character; and, lastly, because of the totally different contract into which the sellers would have had to enter.

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[3] [1949] 2 K.B. 632; [1950] 1 All E.R. 208.

[4] [1959] 1 Q.B. 131.

[5] [1959] 2 W.L.R. 179.

[6] [1925] A.C. 654; 41 T.L.R. 393.

Sir David Cairns Q.C. and *F. E. J. Allemès* for the buyers. A c.i.f. contract is not frustrated by difficulty in shipping the goods: see *Ashmore & Son* v. *C. S. Cox & Co.*,[8] which has been approved by the Court of Appeal in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.*,[9] and has stood unchallenged for 60 years. See also *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[10] These cases show that frustration is not to be lightly invoked. The purchase of future unascertained goods is always to some extent a matter of speculation; it is hard to specify a particular state of affairs on which the contract depends, and it is not necessary to imply into the contract a term that shipping space will be available. A fortiori such a contract is not frustrated because shipping space on any particular route is not available. To support such a contention it must be alleged that the contract was made on the basis that that particular route would be available: see the *Davis* case.[10] If the usual route is to be decided at the time of the performance of the contract, then it must be wrong to say that the parties at the time of the contract must have contemplated a particular route.

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[7] [1956] A.C. 696, 729; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145.

[8] [1899] 1 Q.B. 436; 15 T.L.R. 55.

[9] [1918] 2 K.B. 467; 34 T.L.R. 508.

[10] [1956] A.C. 696.

If these submissions fail, then the alleged basis only exists if there is a fundamental difference between performance by one route and by the other. That is a question of fact. The mere fact of greater distance cannot affect a c.i.f. contract. In *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[11] there was no finding that the goods, shipped by the alternative route, would arrive in an altered condition; and there is none here. [Reference was made to *Universal Cargo Carriers Corporation* v. *Citati (No. 2)*.[12]] Upon the question of a fundamental commercial difference the judge is not entitled to make an inference unless the findings of the Board of Appeal are such that only one inference can be drawn. The extra delay and distance arising in this case did not amount to a fundamental difference. Both are questions of fact for commercial men. The findings in this case do not establish that there was such a difference, indeed they establish the contrary. The finding that, if the sellers had shipped via the Cape, the buyers could not have rejected the documents, involves a finding that the route via the Cape was not fundamentally different in a commercial sense.

The question was not whether the buyers were entitled to insist on performance, but whether they could have rejected the documents if the goods were shipped via the Cape. The finding that performance by shipping via the Cape would not have been commercially impossible also supports the view that there was no fundamental commercial difference. It shows that the Board of Appeal considered the question of the greatly increased expense. There was no suggestion that the increase in time was fundamental to the performance of the contract.

With regard to the second contract, the alleged basis cannot exist at all if the particular route was not available at the time of the contract, unless it be shown that both parties believed it to be available. It is found that shipping facilities via the Canal were at a complete standstill on October 31, and there is no finding that the parties did not know of this. This standstill was the result of circumstances which it is found were common knowledge—the Israeli invasion of Egypt. At most the circumstances were such that no definite route could have been in the contemplation of the parties. The proper way for the sellers to put their case in these circumstances would have been by pleading a mistake. There could hardly be a supervening event if shipping in the Canal was already at a standstill.

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[11] [1959] 1 Q.B. 131.

[12] [1958] 2 Q.B. 254; [1958] 3 W.L.R. 109; [1958] 2 All E.R. 563.

It is agreed that the usual route at the date of the first contract was via Suez; but if the sellers wish to assert that this was still the usual route on October 31, then they must have a finding to this effect. The findings in fact show either that the Cape route had become the usual route, or that there was no usual route at that moment. There is no finding that the parties contemplated that the Canal would remain open. There may well be a situation in which there is no usual route. The relevance of the greater distance which had to be travelled by reason of the closure is only in regard to expense; and this must be considered in relation to a c.i.f. sale, not to a charterparty. [Reference was made to *Brauer & Co. (Great Britain) Ltd.* v. *James Clark (Brush Materials) Ltd.*[13]]

[ASHWORTH J. Are you asking me to differ from the decision of McNair J. in *Carapanayoti's* case? [14]]

There are findings of fact here on which that case could be distinguished; but we invite you to say that he was wrong.

Eustace Roskill Q.C. in reply. This case is indistinguishable from *Carapanayoti's* case,[14] and the buyers cannot succeed unless McNair J. was wrong in that case.

Ashmore & Son v. *C. S. Cox & Co.*[15] was decided before any of the great cases on frustration, in the light of which it must now be considered. It was decided on its own facts—and, indeed, these facts were hypothetical and wrong. In that case and in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.*[16] there were contracts which contemplated performance in spite of difficulties. In the present case the contracts contemplated performance by the usual route, and that tacit assumption was destroyed by a supervening event, which was absent in the two last cited cases. [Reference was also made to *Société Co-operative Suisse des Céréales et Matières Fourragères* v. *La Plata Cereal Co. S.A.*[17]]

[ASHWORTH J. Here the parties have provided for force majeure, but they have not provided for cancellation.]

That was because they did not contemplate that there would be interruption for any long period. In *Ashmore's* case [18] and the *Blackburn Bobbin* case [19] the parties suffered only from an ordinary business risk; but in the *Société Suisse* case,[20] *Carapanayoti's* case [21] and the present case it was not such an ordinary risk.

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[13] [1952] 2 T.L.R. 349; [1952] 2 All E.R. 497.

[14] [1959] 1 Q.B. 131.

[15] [1899] 1 Q.B. 436.

[16] [1918] 2 K.B. 467.

[17] (1947) 80 Ll.L.Rep. 530.

[18] [1899] 1 Q.B. 436.

[19] [1918] 2 K.B. 467.

Cur. adv. vult.

1959. June 5. ASHWORTH J. read the following judgment. This matter comes before me in the form of a case stated by the Board of Appeal of the Incorporated Oil Seed Association, and it raises once more the difficult problem as to the effect upon c.i.f. contracts of the closure of the Suez Canal. This problem has already been considered by McNair J. in *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[1] and by Diplock J. in *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.*[2] In regard to these two cases, the latter was decided principally upon a special finding in the case stated. Inasmuch as there is no finding in the same terms in the present case, the decision of Diplock J. cannot be regarded as conclusive of the present dispute. So far as McNair J.'s decision is concerned, the appellants contend that in respect of the first of the two contracts which I have to consider there is no material distinction between the facts in the case before McNair J. and the facts in the case before me, but they concede that in respect of the second contract the situation may be different.

[His Lordship stated the facts, and continued:] Although the relevant dates are mentioned in both the decisions already cited, it may be convenient to repeat some of them here. On October 29, 1956, armed forces of Israel invaded Egypt; on November 2, 1956, the Suez Canal was closed to navigation by reason of the physical blocking of the canal, and remained closed to navigation until April 9, 1957. In addition, it is found as a fact that on October 31, 1956 (when the second contract was entered into), the sellers and the buyers knew of the Israeli invasion of Egypt which had begun two days previously. Further, although there is no finding as to the parties' knowledge thereof, it is found that shipping facilities from Port Sudan via the Suez Canal had come to a complete standstill on October 31, 1956. This finding appears in paragraph 9 of the case stated, and is difficult to reconcile with what appears to be a finding in paragraph 22 that traffic through the canal was in fact at a standstill

[20] (1947) 80 Ll.L.Rep. 530.

[21] [1959] 1 Q.B. 131.

[1] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[2] [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45.

from October 28. Since there is no finding that either the sellers or the buyers knew that traffic through the canal was at a standstill either on October 28 or 31, 1956, it does not appear to me to be essential to inquire which of the two dates is correct. No question arises as to inability on the part of the sellers to supply the goods. As from September 27, 1956, sufficient groundnuts in shell were held to the sellers' order in store at Port Sudan to enable them to fulfil both the first and the second contracts.

[His Lordship considered the findings in the case stated concerning the availability of shipping, and continued:] In regard to route, it is found as a fact that at the date of the first contract the usual and normal route for the shipment of groundnuts from Port Sudan to western Mediterranean ports was via the Suez Canal, which was then open to traffic. It is further found that at that date both parties, if they had given their minds to the question, would have contemplated that shipment would be made in a vessel proceeding via the Suez Canal. On or very shortly before the date of the second contract, the route via the Suez Canal became for all practical purposes impossible, but there is no finding that either the sellers or the buyers were aware of this, still less that they knew whether the traffic standstill was likely to be of short or long duration. Nor is there any finding as to the contemplation of the parties in regard to route when the second contract was made. There is, however, a finding that " the alternative route during the closure of the canal was " via the Cape of Good Hope which was then the shortest " practicable route from Port Sudan to European ports."

There are also mixed findings of law and fact, of which the first two are in the following terms: " 26. (*a*) If after the closing " of the Suez Canal the sellers had shipped the goods via the " Cape of Good Hope the buyers could not have rejected the " documents. (*b*) While it would have been more expensive to " ship via the Cape of Good Hope than via the Suez Canal this " did not make performance of the first and second contracts " commercially impossible."

At this stage it is convenient to mention two points which were taken, but not argued, on behalf of the sellers. The first was that, in respect of both the first and the second contracts, there was an implied term that shipment should be made by the route customary at the date of the contract. A similar contention was rejected both by McNair J. and by Diplock J.

The second was that the sellers were entitled to rely upon the exceptions clause 8, on the basis that the shipment therein referred to meant shipment via the Suez Canal and that such shipment was prevented. Diplock J. rejected a similar contention based on a similar clause. Both the points are open to the sellers in the Court of Appeal, but in the circumstances I do not propose to do more than express my respectful agreement with the decisions already given upon them.

I can also conveniently dispose of a point taken on behalf of the buyers, which was considered and rejected by McNair J. It was contended that a c.i.f. contract is not frustrated by events which prevent the shipping of goods, and reliance was placed on the decision in *Ashmore & Son* v. *C. S. Cox & Co.*[3] In my judgment that decision does not support the wide contention for which it was relied on, and if all the material facts are contained in the report, I share McNair J.'s doubt whether the decision is consistent with modern authorities, notwithstanding its approval by Pickford L.J. in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.*[4]

The real issue in the present case is whether the two contracts or either of them were frustrated. The sellers contend that frustration occurred either by reason of the closure of the Suez Canal on November 2, 1956, or alternatively, if such closure was not of itself sufficient to frustrate the contracts, because the shipping situation resulting from the closure was so chaotic that it became impossible for the sellers to carry out their obligations under either contract.

The argument for the sellers starts from the premise that under a contract in the terms of the first and second contracts the sellers' obligations include an obligation to procure a contract of affreightment under which the goods will be conveyed by the usual or customary route to the destination named in the contract. There is ample authority to support this premise, and it was not challenged on behalf of the buyers. As a corollary it should be added that, for the purposes of the hearing before me, the sellers acknowledged that the time of performance is the time at which the usual or customary route must be ascertained.

Secondly, the sellers rely on the fact, found in the case stated, that at the date of the first contract the usual or customary route from Port Sudan to the Mediterranean was via the

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[3] [1899] 1 Q.B. 436; 15 T.L.R. 55.

[4] [1918] 2 K.B. 467; 34 T.L.R. 508.

Suez Canal, and, although there is no specific finding either way in the case stated, they contend that at the date of the second contract (two days before the closure of the canal) the route via the canal was still the usual and customary route.

Thirdly, the sellers rely on the absence in the case stated of any finding that another route, in particular the route via the Cape of Good Hope, became at any relevant time a usual or customary route for vessels sailing from Port Sudan to the Mediterranean. The most that is stated is that "the alternative "route during the closure of the canal was via the Cape of Good "Hope which was then the shortest practicable route from Port "Sudan to European ports." Accordingly, the sellers submit that, in these circumstances, the usual and customary route via the canal having been rendered impossible and there being no other usual or customary route, the contracts were each of them frustrated.

At one stage of the argument the sellers appeared to be contending that this type of contract is frustrated ipso facto if the usual or customary route is rendered impossible. The terms of this contention are, in my judgment, much too wide to be acceptable. There may no doubt be cases in which the impossibility of the usual or customary route would have the effect of frustrating such a contract; for example, a c.i.f. contract in respect of goods to be shipped from a Black Sea port to the Mediterranean might well be regarded as frustrated if the Dardanelles were rendered impassable, but in that case the usual or customary route would be the only possible route. But if an alternative route exists, the closure of the usual or customary route does not necessarily frustrate the contract. In this connection it is, I think, correct to say that the requirement that the goods must be shipped by a usual or customary route is a requirement implied by law for the benefit of a buyer and not a seller. So far as a seller is concerned, his obligation is to arrange shipment from A to B, and were it not for the requirement as to a usual or customary route, he could select his own route. The fact that he can no longer select what has hitherto been the usual or customary route does not, without more, release him from the primary obligation to arrange shipment from A to B.

As an alternative to the last-mentioned contention, it was submitted that frustration occurs if the usual or customary route is rendered impossible, unless, within the time limited for performance of the contract, an alternative route has become the usual or customary route. In my judgment, this submission does not give effect to the well-established principle that, if frustration occurs, it occurs once and for all. If the closure of the Suez Canal had the effect of frustrating either or both of the contracts in the present case, the contract or contracts were automatically dissolved and were not preserved in a state of suspended animation, the outcome of which depended on an alternative route becoming usual or customary before the end of November, 1956.

In my judgment, in considering whether a contract of this type has been frustrated by the disappearance of the usual or customary route, one has to decide (inter alia) whether an alternative route existed, and, if so, whether performance by that route would " render it a thing radically different from that which " was undertaken by the contract," to quote the words of Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[5] The sellers contend that shipment via the Cape of Good Hope, which was an alternative mode of performing the contracts, would fall within the scope of the words quoted, and the points of difference were said to be (a) expense, (b) distance, (c) the character of the voyage, and (d) a totally different contract of affreightment.

So far as expense is concerned, it seems to me that the finding in paragraph 26 (b), quoted above, precludes me from holding that the increase in expense was sufficient to frustrate the contract. In regard to distance and the character of the voyage, there may well be cases in which buyers could reject documents on the ground, for example, that the goods in question had been shipped by a route which would render them liable to damage or deterioration or unreasonable delay; and if that route were the only alternative to a usual or customary route which had been rendered impossible, sellers might well claim that the contract had been frustrated. But in the present case it is found in paragraph 26 (a) that if, after the closing of the Suez Canal, the sellers had shipped the goods via the Cape of Good Hope the buyers could not have rejected the documents. I regard this finding as one of mixed law and fact, and I draw the inference from it that documents covering shipment via the Cape of Good Hope would, in the circumstances, have been in compliance with the contract. In other words, neither the distance nor the character of the voyage would have been such as to entitle the buyers to reject the documents. In regard to the fourth suggested difference, namely, that the sellers would have had to arrange a totally different contract of affreightment, I am of opinion that, so far as it goes, the difference so stated is made out; but I am also of opinion that it does not do more than summarise the other suggested differences. If they are not sufficient to " render it a thing radically different from that which " was undertaken by the contract," this fourth suggested difference will not do so.

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[5] [1956] A.C. 696, 729; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145.

In Lord Radcliffe's speech, from which I have already quoted, there is a further passage in the following terms [6]: " The court " must act upon a general impression of what its rule requires. " It is for that reason that special importance is necessarily " attached to the occurrence of any unexpected event that, as " it were, changes the face of things. But, even so, it is not " hardship or inconvenience or material loss itself which calls the " principle of frustration into play. There must be as well such " a change in the significance of the obligation that the thing " undertaken would, if performed, be a different thing from that " contracted for." In the present case an unexpected event occurred, namely, the closure of the Suez Canal, and no doubt it may be said to have involved both inconvenience and material loss. But I am not satisfied that there was also involved such a change in the significance of the obligation as would call the principle of frustration into play. Both before and after the closure of the canal, the thing undertaken was the arranging of the shipment of the goods from Port Sudan to the Mediterranean. After the closure the thing undertaken remained the same, but the manner of performance changed.

It is clear that the nature and extent of the thing undertaken is a vital factor in considering whether a contract has been frustrated, and when a difference in the length and character of a voyage is said to give rise to frustration, the answer may in some cases depend upon whether the contract involved an obligation to perform the voyage itself, or, on the other hand, an obligation to arrange for its performance. I was informed by counsel that issues which had arisen between charterers and shipowners as a result of the closure of the Suez Canal had all been settled, so that there has been no authoritative decision whether a charterparty was frustrated in these circumstances. Whatever may be the right view in respect of that type of contract, I am of opinion that, in the present case, although the performance of the sellers' obligation after the closure of the Suez Canal would have involved them in greater expense, they would not have been performing something radically different from that which they had undertaken to do. In reaching this conclusion I am regretfully conscious that I am differing from that reached by McNair J., and although the facts found in the present case are not precisely the same as those before him, I doubt whether on this point the differences are such as to afford any firm basis for distinguishing his case from this.

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[6] [1956] A.C. 696, 729.

I have also considered the problem, so to speak, from the other end, namely, whether the contracts or either of them were made on the basis that if the Suez Canal was no longer available when the sellers elected to perform, they would be off. The first contract was made on October 12, 1956, and the second was made on October 31. So far as the first contract is concerned, it is found in paragraph 20 of the case stated that " both parties, " if they had given their minds to the question, would have " contemplated that shipment would be made in a vessel proceeding via the Suez Canal." No doubt they would have done so, but the question is whether they " must have made " their bargain on the basis that what was then the usual or customary route would continue to remain available. To quote again from Lord Radcliffe's speech[7]: " In my opinion, full weight ought to " be given to the requirement that the parties ' must have made ' " their bargain on the particular footing. Frustration is not to " be lightly invoked as the dissolvent of a contract." The buyers contend that the alleged basis can only exist if there is a fundamental commercial difference between performance by the contemplated route and performance by the alternative route. In my view this contention is right, and inasmuch as I have already, in effect, held that no such fundamental commercial difference has been established on the facts of this case, it follows that the alleged basis, namely, the continued availability of the Suez Canal, was not the basis on which the parties " must have made " their bargain.

So far as the second contract is concerned, the same reasoning applies, but, in any event, the circumstances in which it was made afford an additional reason for holding that it was not made

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[7] [1956] A.C. 696, 727.

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ALBERT D. GAON & CO. v. SOCIÉTÉ INTERPROFESSIONELLE DES OLÉAGINEUX FLUIDES ALIMENTAIRES.

Ashworth J.

on the basis suggested. The parties knew that Israeli forces had invaded Egypt on October 29. Moreover, there is no finding in the case stated that on October 31 the parties or either of them contemplated that the Suez Canal would be available, and I confess that, having regard to the situation then prevailing in the Middle East, a finding to that effect would have surprised me. In regard to the second contract, the sellers were described by their counsel as optimists, and such they may well have been, but such a state of mind falls far short of what is required.

[His Lordship proceeded to consider and dismiss the sellers' contentions that the contracts were frustrated by reason of the chaotic shipping situation which was alleged to have prevailed as a result of the closure of the Suez Canal, and that shipment was prevented by force majeure within the meaning of clause 8 of I.O.S.A. Contract No. 38.]

The question put was whether on the facts found and on the true construction of each of the contracts the sellers were under any liability to the buyers. My answer in respect of each contract is "Yes," and accordingly the appeal fails.

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

The sellers in both cases appealed.

C. A.

1960

TSAKIROGLOU & CO. LTD. v. NOBLEE THORL G.M.B.H.

Eustace Roskill Q.C. and *R. A. MacCrindle* for the sellers. The sellers contend that the contract to ship groundnuts was frustrated by the Suez incident. This view was taken by McNair J. in *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*,[1] where he held that to ship via the Cape was a fundamentally different obligation than to ship via Suez. His conclusion was right in law. The closure of the Canal was an event of such catastrophic magnitude that it defeated the contract either by necessary implication or by the term of the contract itself.

The problem is yes or no: does the contract upon its true construction embrace the obligation of performance via the Cape, when the contemplated performance was via Suez? The right approach is to determine what is the sellers' relevant obligation, since it is from the performance of that obligation which the sellers seek to be excused; the relevant obligation is to procure a contract of freight under which the goods will be conveyed by the usual and customary route to their destination: see Kennedy on C.I.F. Contracts, 2nd ed., p. 39.

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[1] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

Shipment by the Canal was the only route contemplated; and at any time when the Canal had not been blocked, to have presented a bill of lading via the Cape would have been a breach of the contract. That was the position up to November 1, but on November 2, according to the judgments of Ashworth and Diplock JJ., the sellers were in breach for not shipping via the Canal. There was at the date of the contract only one usual and customary route—had there been two, it would have been different. None of the trade tribunals found that the Cape was ever a usual and customary route.

The parties contracted on the basis of a tacit assumption that the Canal would remain open for navigation throughout the whole of the contract period, and therefore the contract must be construed as if it were an implied term that the Canal should remain open. The finding that the Canal is the usual and customary route is vital: *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[2]

These were contracts of freight by the usual and customary route and, there being only one possible route, the question is whether the obligation ceases with the closure of the Canal or whether there is any residual obligation under the contract which obliges the sellers to ship by a route not contemplated by the parties. It is an impossible construction of the contract and against authority to hold otherwise than that the obligation ceased. It was not an implied term which it could be said that the parties would have contemplated had they been asked at the date of the contract.

Where a c.i.f. contract can be performed by more than one usual and customary route, and one of those becomes impossible, it is not contended that the contract ipso facto is frustrated, but where there is only one such route, a new usual and customary route cannot be brought about overnight. It could not be so in this case when the closure of the Canal was of a comparatively temporary nature.

To accept the proposition that the route via the Cape should have been adopted, one has to accept the whole width of the proposition that if there is a practicable route, whatever its length, it must be adopted.

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[2] [1956] A.C. 696; [1957] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.

[HARMAN L.J. Why should you not construe the contract as meaning by the best available route?]

In no c.i.f. contract has it ever been held that it meant the best available route. There is nothing to suggest that the contract was not made in the contemplation of the Canal being open; there is no finding that either party knew of the shipping position or ever contemplated the route via the Cape. Performance of the contract via the Cape from the shipowners' point of view is a wholly different contract: *Jackson* v. *Union Marine Insurance Co. Ltd.*[3]

Confusion exists between the two different types of frustration. The first is where the frustration relied on is delay, so that the question to be determined is whether the performance of the contractual obligation at a later date is, as a matter of business, the performance of the same contractual obligation or whether it is the performance of a different obligation; then questions of fact and degree arise and it becomes a jury question whether the delay would be such as to defeat the commercial adventure. *Jackson's* case[4] was such a case. The second type of frustration is where the contract calls for a different method of performance during the time limited by the contract for the performance, and no questions of fact and degree come into the picture at all, and it is solely a question of law for the court, be it a matter of construction or implication. The contrast between the two types is between the same performance in a different way and a different performance at the same time. *Jackson's* case[4] and *Bank Line Ltd.* v. *Arthur Capel & Co.*[5] were both in the first class and there was an element of degree.

[SELLERS L.J. Cannot there be a question of degree in the method of performance?]

It is submitted not. In *Jackson's* case[6] the question was whether the plaintiffs could recover for a constructive total loss of freight owing to frustration of a charterparty by delay in performance. It was held that the charterparty was frustrated and the claim succeeded.

The case on frustration can be summarised as follows: It is always a question of law; it depends on implication or construction, and the only relevant facts are the surrounding circumstances against the background of which the contract was made. The only type of frustration where there may be a question to go to a jury, other than that of surrounding circumstances, is where the frustration is delay, when there may be a question of fact whether the performance of the relevant obligation at one time or another is, as a matter of commercial speculation, performance of the obligation under the contract. Where the court is concerned, not with delay as such but with whether the contract embraces a second and alternative mode of performance, the view of the tribunal of fact as to the difference or similarity of one mode of performance or another is wholly irrelevant.

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[3] (1873) L.R. 8 C.P. 572; (1874) L.R. 10 C.P. 125, Exch.Ch.

[4] L.R. 8 C.P. 572; L.R. 10 C.P. 125.

[5] [1919] A.C. 435; 35 T.L.R. 150, H.L.

[6] L.R. 8 C.P. 572; L.R. 10 C.P. 125.

If there were room for writing in the contract some term other than the usual and customary route, then, notwithstanding the special finding of the tribunal, the route round the Cape is so divergent in nature that it is outside the contract. It is shown by *In re L. Sutro & Co. and Heilbut, Symons & Co.*[7] that a route alternative to the usual and customary route cannot be implied into a contract. The route is ascertained at the date of the performance of the contract: *Green's* case.[8] *Reardon Smith Line Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[9] was a deviation case and not a c.i.f. contract case. Nothing in the speech of Lord Wright in that case related to the usual and customary route under a c.i.f. contract; he was dealing with the practice of sending ships to the customary bunkering port.

Reliance is also placed on the exceptions clauses [clauses 6 and 8 in the *Tsakiroglou* and *Gaon* cases respectively]; the word " shipment " in the charterparty must be given a wide meaning; it does not merely mean placing the goods on board a ship, it means loading and shipping to the port of destination by the right route. The difference between *In re Comptoir Commercial Anversois and Power, Son & Co.*[10] is that " prevention " there meant force majeure. [*Fairclough, Dodd & Jones Ltd.* v. *J. H. Vantol Ltd.*[11] was also referred to.]

John Megaw Q.C. and *J. F. Donaldson* for the buyers in the Tsakiroglou case. It is for the sellers to establish that the facts amount to frustration. The question is whether performance of the contract by shipment for carriage via the Cape radically differs from performance by shipment for carriage via Suez, and the finding of fact by the tribunal chosen by the parties was that it did not. That finding is unassailable in any court.

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[7] [1917] 2 K.B. 348; 33 T.L.R. 359, C.A.

[8] [1959] 1 Q.B. 131.

[9] [1939] A.C. 562; 55 T.L.R. 929; [1939] 3 All E.R. 444, H.L.

[10] [1920] 1 K.B. 868; 36 T.L.R. 101, C.A.

[11] [1957] 1 W.L.R. 136; [1956] 3 All E.R. 921, H.L.

As to any question of customary or available route, the question has to be treated as at the date of the performance and not at the date of the contract. For this purpose no material difference exists between contracts for the sale of goods and contracts of affreightment: *Evans, Sons & Co.* v. *Cunard Steamship Co. Ltd.*[12] Although that case related to a deviation clause, the first part of the decision of Wills J. was unrelated to deviation and stands by itself on the question of the only practicable route. That decision was approved by Lord Dunedin in *Frenkel* v. *MacAndrews & Co.*[13]

The following propositions are submitted: (1) To determine what is the proper route, regard must be had to the time when shipment of the goods falls to be made. That time is the time when the part of the contract of sale, which puts on the seller the obligation to ship the goods, falls to be performed. (2) There must be shipment at that time for carriage by a usual and customary route, or, if for any reason none such exists, by the, or a, practicable route, even though it is not, or has not yet become, "usual or customary." (3) This is subject to the qualification that if this practicable route was not contemplated by the parties when the contract was made, and shipment for carriage by another route involves the performance of a "thing radically "different from that . . . undertaken by the contract," then the doctrine of frustration comes in: *Davis Contractors Ltd.* v. *Fareham U.D.C.*, *per* Lord Radcliffe.[14] (4) The thing undertaken here is a sale of goods which involves an obligation on the sellers, amongst other things, to make a contract with shipowners for carriage of the goods from Port Sudan to Hamburg. (5) When the contract of sale was made, both parties contemplated that when the time came for shipment it would be for carriage by the Suez Canal, as being the usual route, but that was not a term of the contract, express or implied. (6) The implied term of the contract related to the then usual and customary route or, if for any reason that was not available, the practicable route, provided that the change from what was contemplated did not change the obligation into a different thing. (7) In the present case, there is no ground for saying that the obligation was changed into a different thing, and, indeed, the tribunal chosen by the parties has found, or held, the contrary.

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[12] (1902) 18 T.L.R. 374.

[13] [1929] A.C. 545; 45 T.L.R. 311, H.L.

[14] [1956] A.C. 696.

As to propositions (1) and (2), the passage cited from Kennedy is irrelevant on anything except custom: see also *Evans, Sons & Co.* v. *Cunard Steamship Co. Ltd.*[15] The dissenting judgment of Scrutton L.J. in *Sutro's* case[16] was relied on, but that case related to the carriage of goods by an alternative route which was inconsistent with the contract; that is not the point here. Reliance is placed on the reasoning of McNair J. in *Green's* case[17] that the contract must be carried out in a manner which is customary at the time when performance is called for, and on the judgment of Diplock J.

As to frustration, the contract cannot be treated as frustrated unless both parties must have said, if they had been asked, that it would be at an end. One has to look at each contract separately. Where there is a usual and customary route at the date when the contract of sale is made, it is a question of degree whether deviation amounts to frustration, and the change involved makes it a different transaction. Being a question of degree, it is a question of fact for the tribunal which the parties have chosen as particularly suitable to decide this matter: see *Jackson's* case.[18]

It is wrong to say that the Appeal Board were not concerned with the question of law; they have to come to a decision; if they only decided the facts and asked the court as to the law, there would be no award. But if, on their findings of fact, there is only one possible answer to the question of law, their decision, which they were obliged to state in the award, on the question of law, is unassailable. Even if, contrary to the buyers' submission, the finding of the Appeal Board that there was not fundamental or commercial difference is not a finding of fact or is not conclusive, the sellers have completely failed to establish any fact which would warrant the conclusion that there was a fundamental difference in the commercial sense.

It is for the sellers to establish that this contract was frustrated, not for the buyers to establish that it was not frustrated. There is a finding by commercial men that performance via the Cape was not a radically different thing, and the court would have to disregard that finding to hold that it was radically different. Even if this be not a question of fact, but mixed fact and law, it must be of grave consequence to overthrow that finding. The court is entitled to disregard it if it is perverse or wrong in law.

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[15] 18 T.L.R. 374.
[16] [1917] 2 K.B. 348.
[17] [1959] 1 Q.B. 131.
[18] L.R. 8 C.P. 572; L.R. 10 C.P. 125.

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[Sellers L.J. Why is the very much enhanced distance of no materiality?]

It is longer in time—the mileage is greater—and it costs more to the shipper, but a mere difference in miles is not a commercial difference, and the finding by the tribunal is that the alternative route does not make the performance of the contract of sale commercially different from what the parties contemplated when they made the contract.

The differences which might have been suggested, in relation to performance of the contract of sale by shipment via the Cape as contrasted with its performance by shipment via Suez, are: (1) Increase in the freight charges; (2) different obligations of the seller as regards the condition of the goods on shipment, their packing, stowage, etc., and (3) that the goods might arrive at a later time than the parties had contemplated when they made the sale contract. As to (1), a mere increase in the expense to one party—at any rate a proportionately small increase such as was involved in this case—is irrelevant, and McNair J. so agreed in *Green's* case.[19] As to (2), there was no evidence, and there is no finding of fact, and indeed no contention by the sellers, that any such difference arose or could arise in relation to these goods. As to (3), it was not put forward by the sellers to the Appeal Board, it was not suggested by McNair J. in *Green's* case,[19] and it would be quite insufficient to give rise to a fundamental difference in a contract such as this, where the seller has a latitude of two months within which to ship, and no provision is made as to the class or speed of the vessel in which the goods were to be carried.

There are numerous reasons why delay is not commercially important, and the serious disadvantage would be to the buyers, who are clinging to the contract, not the sellers, who are claiming frustration.

As to the exceptions clause, force majeure means something which actually prevents the shipment of goods, and "shipment" means putting the goods on board within the time fixed and nothing else. There was nothing to prevent the sellers shipping the goods in the time provided by the contract. That was the finding of the arbitrator, and the court should not reverse his finding unless there is no evidence to support it: *per* Devlin J. in *Universal Cargo Carriers Corporation* v. *Citati.*[20]

Sir David Cairns Q.C. and *S. O. Olson* for the buyers in the Gaon case. In substance the contentions of the buyers in the second case are exactly the same as those in the first, with the exception of the finding by Diplock J., and the argument on their behalf is adopted.

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[19] [1959] 1 Q.B. 131.

[20] [1957] 2 Q.B. 401, 435; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.

In dealing with frustration it is necessary to bear in mind the two different types of frustration, that a distinction between delay on the one hand and all other types on the other is a dichotomy not justified by the cases; the real dichotomy is between cases where there is the impossibility of performing the contract on the one hand, i.e., where a physical change has taken place in the performance of the contract; and the second class, such as the Coronation cases, for example, where there is such a fundamental alteration of the circumstances in which the contract was undertaken that the commercial object of the contract would be defeated. If the sellers relied on the first type of case they could succeed only if they could show that in c.i.f. contracts the obligation is solely to ship by the usual and customary route and that that route was not available: *Bowes* v. *Shand*.[21] In commercial matters it is the effect on the commercial position which has to be considered. If someone is taken on a cruise, there is a fundamental difference if he is taken round the Cape and not to the Mediterranean, but in the carriage of goods that is not important, and a different direction and a different distance are not of commercial importance. As to the closure of the Canal, it could be said, at any rate during the month of November, that the usual and customary route was via the Cape. There was evidence that some ships used it—after the closure of the Canal it was the only available route.

[Sellers L.J. Was there any evidence that that route was used before the blockage of Suez?]

It is not established that it was the usual and customary route, but there is no finding that this was not the usual and customary route during November, and the onus is on the sellers to establish that it was not. As to whether a route was reasonable, see the three tests laid down by McNair J. in *Green's* case.[22]

It is conceded that the freight is bigger in one case than in the other, but the carriage of the goods is only one of the incidents concerned; the price of the goods themselves is the main thing; there is also the insurance.

Larrinaga & Co. Ltd. v. *Société Franco-Américaine des Phosphates de Medulla, Paris*,[23] supports the argument that change

[21] (1877) 2 App.Cas. 455, H.L.

[22] [1959] 1 Q.B. 131.

[23] (1922) 29 Com.Cas. 1, 18, H.L.

from a profitable to a non-profitable enterprise is not a sufficient event to constitute frustration of the contract. Events happen so quickly—whether it be the closure of the Canal or the Korean war—that all commercial men are aware that events may arise involving change of freight. The specific finding by the tribunal was that although it was more expensive to ship via the Cape than through the Canal, it did not make the contract commercially impossible. Whether that be a finding of fact or law, it is at least a finding by commercial men that difference in expense was not a fundamental difference.

Alternatively, it cannot be established that the route via Suez was the only route contemplated, and the findings of fact by the tribunal are such that the change was not sufficient for it to be said that closure made the contract impossible to perform. The question is whether the difference in performance is something which goes to the root of it. Applying the test of the officious bystander, would he have said that the contract was off if the Suez Canal was closed? It is submitted not.

The exceptions clause stands or falls by the same factor as the question of frustration.

Roskill Q.C. in reply. The buyers have both approached the question of frustration as if the only question were the increase of freight, and, because the sellers could pay the extra freight, they say that the contract was not impossible of performance.

One has to consider what was the nature of this contract: it was to procure a contract of affreightment, and the bill of lading was the title to the goods; it was the key to the floating warehouse. If the sellers are held to this contract after the closure of the Canal, it is not this contract of affreightment but another, and the sellers become entitled to a different key to a different floating warehouse, which, had it been tendered before the closure of the Canal, would have been thrown back on them. This comes down to the difficult question of law, what is the relevant obligation? The questions which arise cannot be decided against the sellers without making new law; the case can be decided in their favour without making new law and in line with the best relevant authority. The new law would be to imply a condition that if there is no usual and customary route, then it must be by the most convenient and practicable route.

If the sellers were put under an obligation to procure a contract of affreightment by the best reasonable route available, they would never know what that obligation would be; they would be

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buying a pig in a poke, and they might be obliged to take a route of which no one in their wildest dreams had thought. So far from there being any authority that under a c.i.f. contract one implies a practicable route, the authorities are the other way. Reliance is placed on *Sutro's* case [24] and the passage in Kennedy (at p. 39), which has never been challenged. In the long history of c.i.f. contracts no one has ever expressly specified the route into the contract; if they did, it would be the usual and customary route. The sellers' obligation is not to ship by the usual and customary route but to tender a bill of lading in the form customary in the trade; the usual form of bill of lading would be one which provides for shipment by the Canal and not via the Cape. The bill of lading is the vital document; it is the title to the goods on which the buyers get delivery; they would not in the circumstances here be tendered a bill of lading in the customary form.

Cur. adv. vult.

1960. March 28. The following judgments were read.

SELLERS L.J. These two appeals were heard together by the consent of the parties, as they both relate to contracts of sale of groundnuts in the shell for shipment, cost, insurance, freight from Port Sudan, which were unperformed at the time of the blockage of the Suez Canal on November 2, 1956, and the sellers, the appellants in these appeals, relying on that event as sufficient justification, failed to make shipment within the contract periods of the goods sold, and claimed that they were no longer bound to do so. In respect of each contract the sellers had the groundnuts available for shipment and had arranged reservations of shipping space to the respective destinations via the Suez Canal. These reservations were cancelled by the shipowners and the sellers made no other arrangements in fulfilment of these contracts, and apparently did not attempt so to do. It was established in both the cases that shipment could have been made via the Cape of Good Hope although, no doubt, it would have involved a greater cost.

The main issue is whether the respective contracts required the sellers to ship the goods via the alternative route of the Cape when the anticipated route via the Suez Canal was closed. This has been decided in favour of the buyers in each case by the umpire, and by the Board of Appeal of the Incorporated Oil Seed Association, and by Diplock J. in the *Tsakiroglou* case[1] and Ashworth J. in the *Gaon* case.[2] In the former case Diplock J. felt that the matter was concluded by the findings of the appeal tribunal.

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[24] [1917] 2 K.B. 348.

[His Lordship having stated the facts, continued:] The effect of the blockage of the Suez Canal on shipowners was obvious, for the relatively short route through the Canal was denied them, and for destinations such as we are considering in these cases a different and much more prolonged journey had to be substituted. But the question is, what effect that had on the contract of sale between the parties here.

The sellers contended that the contract in each case should be read as if it contained the provision "shipment from Port "Sudan via the Suez Canal." Further, the Tsakiroglou Company had sought an extension of two months, relying on clause 6 of the contract, alleging that they were prevented from making the shipment by war or force majeure. The buyers refused. [His Lordship read clause 6.] The comparable clause in the Gaon contract was clause 8, and it was similarly relied on. These two questions can conveniently be considered together.

It was submitted that although the contract of sale did not state the route by which the goods were to travel, it was in the circumstances to be implied that they would be shipped by the Suez Canal, which was the usual and normal route and the route in the contemplation of the parties at the making of the contract. Shipment, too, it was said, meant the intended shipment, the one for which they had contracted and made provision, and as that was not available by circumstances beyond their control the extension ought to have been granted.

If the sellers had stipulated expressly for shipment via Suez in these contracts they would, no doubt, have been on strong ground in the events which arose, but they did not so stipulate, and I can see no adequate ground on which to imply into the contracts any such term or requirement. The sales were for future shipments and the circumstances at the time of shipment would be more important to the parties than at the time of the making of the contract. It is true that the cost of the freight was included in the price. This is a risk which falls on the seller under such a contract, and whilst he may have to pay more freight than he contemplates at the time of contracting unless he has made a firm engagement of freight before he makes his sale, he may, on the other hand, find that he has to pay less.

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[1] Ante, p. 325; [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45.

[2] Ante, p. 341; [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693.

In *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*,[3] which was the first of what counsel described as the " Suez " cases to come before the courts, McNair J. held that where a contract provides that the performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for. I agree with McNair J.'s opinion and the reasoning by which he supported it that the obligation of the sellers is not confined to shipping by a route usual and normal at the time of the contract.

Mr. Roskill relied on the judgments in *In re L. Sutro & Co. and Heilbut, Symons & Co.*,[4] and especially the dissenting judgment of Scrutton L.J., to support his argument on the terms to be implied into the contract, but the point which arises here was not there under consideration. In that case the sea route and the overland route were both in use at the time of the contract and at the time of its performance. I do not think one can deduce any real support from the case for the argument. There has been unanimity amongst the judges who have considered this submission, and I am in full agreement with their views in rejecting it.

Although there were hostilities in Egypt and in the region of the Suez Canal at the material times, there has been no finding of war, and I think it is clear that neither war nor force majeure prevented shipment of the contract goods. Shipment means physically putting the goods on board a vessel, and, if there was a duty on the sellers to put the contractual goods on board a vessel for a voyage round the Cape to the contractual destination, there was nothing to prevent them doing so and clause 6 does not protect them.

There is no finding that after the Suez route was closed, and at any time for shipment under these contracts, there was any normal route for shipping from Port Sudan to the ports concerned. The Cape route, the sellers said, was and remained an emergency route. They therefore relied on the statement (on p. 39) of " C.I.F. Contracts " in the 2nd ed., the last by Judge Kennedy: " In the absence of express terms in the contract the

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[3] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[4] [1917] 2 K.B. 348; 33 T.L.R. 359, C.A.

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"customary or usual route must be followed. A usual route need "not be the invariable route. In one case a route followed in one "half of the recorded cases was held to be a usual or customary "route"—and it was said that as there was no usual or customary route the contract could not be performed by the sellers.

The case referred to was *Evans, Sons & Co.* v. *Cunard Steamship Co. Ltd.*,[5] on which, in the argument before us, both sides in their turn relied. It was a claim by a shipper against a shipowner who had carried his goods on a rather prolonged and devious journey, having taken them on board on an outward journey which continued to its end before turning round to come home and then going by way of Constantinople, as it was in those days. The case turns on the obligations which the shipowner had entered into with the plaintiff and its bearing, if any, in the present dispute seems indirect. Willes J. said, however, in the course of his judgment: "If that is the only voyage practicable, that must "be the voyage in the business sense agreed upon."

The passage in Kennedy seems to assume that there would be a usual route but the trade may be new, or the usual route—if there was only one usual route—may become, as here, no longer available or may, I suppose in changing circumstances, fall into disuse. I would accept the buyers' submission that when the Suez route became unusable the sellers' duty was to put the goods on a vessel destined to the required port by a reasonable and practicable route, if there is such an alternative when the contract is properly regarded. If in a c.i.f. contract no route were expressly specified, or if no usual or normal route had impliedly been established as the route to be taken under the contract, as in the case of a new trade between two new ports, then clearly it would seem that the implication would be that the parties intended the goods to be sent by a reasonable and practicable route. But here there had undoubtedly been a usual route.

The buyers contended that shipment via the Cape of Good Hope was the most practicable and the best route available at the respective times for shipment after November 2, 1956, and that it has not been shown that the sellers could not have made shipments accordingly. At the most it would have cost them more freight. That, I think, is true. The question is whether such shipment would have been reasonable and practicable so as to bring it within the sellers' contractual obligation or whether, as the sellers contended, the contracts could not be performed as intended and, therefore, each contract was at an end on the ground, it was said, that it had been frustrated.

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[5] (1902) 18 T.L.R. 374.

Ashworth J. put the question in this way[6]: "In my judgment "in considering whether a contract of this type has been "frustrated by the disappearance of the usual or customary route, "one has to decide (inter alia) whether an alternative route "existed, and, if so, whether performance by that route would "'render it a thing radically different from that which was "'undertaken by the contract' to quote the words of Lord "Radcliffe in *Davis Contractors Ltd.* v. *Fareham U. D. C.*[7]"

I think that is the question which arises here. What are the differences, one may ask, from the point of view, not of a shipowner who is required to send his ship on a different and greatly longer route, but of the parties to a c.i.f. contract.

The obligations of the parties to such a contract of sale in its ordinary form are well defined and are conveniently summarised by McNair J. in *Green's* case.[8] This form of contract no doubt developed commercially because it had advantages for both parties and it has long been used, often with adaptations and variations. Where a considerable journey by sea is involved, the contract and the goods are not, as it were, in suspense. The seller can, in various ways, raise money on the goods he has shipped almost at once and the buyer, once he has taken up and paid for the documents, can deal with the goods by transferring the documents before the goods have arrived at the port for delivery. These factors minimise the disadvantages of delay in receiving the goods on the buyer's side, and delay in receiving payment on the seller's side whilst the goods are on the high seas. The bill of lading on which the goods are carried is, no doubt, a vital document in the transaction, in conjunction with an insurance policy to cover the risks of transit, and an invoice to describe the goods shipped and their cost.

But it is the importance of the route which the goods will take which is an issue in this case. It is conceded by the sellers that a mere increase of freight is a burden which would fall on them. Circumstances might arise in which freights might go up very substantially for the "usual and normal route" or they might go down. These variations normally affect the seller and not the buyer. They are his risk or advantage. Once the seller has shipped the goods and obtained the necessary documents and passed them to the buyer, he is no longer concerned with the sea voyage of the goods except to the extent, in some cases, of the final settlement of the balance of the payment for the goods when the delivered weights have been ascertained, which cannot be regarded as a substantial or fundamental matter in the contract.

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[6] Ante, p. 345.

[7] [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.

[8] [1959] 1 Q.B. 131, 143.

The sellers' conduct, in these cases, in performance of the contracts would not have differed. They had the goods available. They had to put the goods on board a vessel at Port Sudan and get a bill of lading to the port of delivery in respect of each consignment on shipment within the contractual date and then take out an insurance cover and make out the invoice. The only difference would have been the journey of the vessel after she left Port Sudan, and any extra cost involved in arranging the contracts of affreightment and insurance.

From the buyer's point of view goods on a longer sea journey would be subjected to a longer period in the hold of a ship and possibly to the rigours of cold or heat, and the goods would not arrive as early as the buyer would have contemplated by the "usual route." In the present cases the equator would have been crossed twice, but this apparently would have had no ill effect on these goods, and the date of arrival might have been delayed some three or four weeks according to the speed of the vessel engaged.

Mr. Roskill, for the sellers, put his point graphically when he said that, if the sellers had shipped the contract goods via the Cape of Good Hope whilst the Suez Canal was an available route, it would have been a breach of contract. Why then is it not a totally different contract to ship by that route when Suez was closed?

I think the answer is that the changed circumstances gave rise to a change in the performance of the contracts by the sellers, but it is not so fundamental a change that it can be said to be commercially different or of such a character that the parties at the time of the making of the contract, if they had considered the position, would have said with one voice that in those circumstances their bargain would be at an end.

If by April, 1957, the route by the Cape of Good Hope had become a "usual route," I cannot think that the sellers would have been in default in the absence of express stipulation in shipping via Suez when it opened again, although they might have got an advantage of a lower freight. It would not have been a fundamentally different contract of sale.

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I agree with the view of Ashworth J. and regret that it is contrary to the view taken by a very experienced commercial judge, McNair J., in very similar circumstances in *Green's* case.[9] It is, however, the same opinion as that held by those engaged in or very familiar with the trade who have formed the respective arbitration tribunals in these cases, in one of which—the Gaon case—there was an express finding: "If after the closing of the "Suez Canal the sellers had shipped the goods via the Cape of "Good Hope the buyers could not have rejected the documents." They might not, one may assume, have so found if the longer voyage would have caused the goods to deteriorate appreciably in quality or perhaps even in weight, or if the delay would have been unduly prolonged.

As the view I have taken of these appeals agrees with the finding in the *Tsakiroglou* case that "the performance of the "contract of shipping the goods on a vessel routed via the Cape of "Good Hope was not commercially or fundamentally different "from its being performed by shipping the goods on a vessel "routed via the Suez Canal," it is not necessary to decide whether Diplock J. was bound to accept that finding in the case as conclusive, as a "special verdict" of a jury, as he put it. It will not affect the result of this appeal. The pronouncement was made in the time-honoured but not very satisfactory form of a special case "so far as it is a question of fact we find and as far as it is a "question of law we hold." How far was it a question of fact? Very largely, no doubt. But it must, in my opinion, be the ultimate function of the court to say whether on the facts found, and in all the circumstances, there arises frustration of a contract or adventure. Ashworth J., I think rightly, treated like findings in the Gaon case as mixed findings of law and fact.

Mr. Roskill argued forcefully that if it were otherwise a tribunal, by such a finding of fact, if so it is to be regarded, could state the parties out of court in a frustration case, and there could be conflicting decisions on precisely similar contracts and facts. I apprehend that if the present decision of this court is right, then a decision of an arbitrator or umpire on similar facts in answer to the same question would be wrong in law.

In *Jackson* v. *Union Marine Insurance Co. Ltd.*,[10] on which Diplock J. relied, although Brett J. put as a third question to the jury "whether such time was so long as to put an end in a

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[9] [1959] 1 Q.B. 131.

[10] (1873) L.R. 8 C.P. 572; (1874) L.R. 10 C.P. 125, Exch.Ch.

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"commercial sense to the commercial speculation entered upon "by the shipowner and the charterer," that judge in a judgment with which Keating J. agreed reviewed many authorities, including directions to and findings of juries, and as I understand it considered whether the jury's verdict could stand as a matter of law, and held that it did. Bovill C.J. took a contrary view.

I agree with Diplock J. that this finding of fact made by the appeal tribunal was of the utmost relevance in answering the ultimate question of law, and on the view of the law which Ashworth J. applied (and with which I agree) it was conclusive, because it was that issue of fact which answers the question of law in this particular case, and there is evidence to support it and no misdirection.

It was argued for the buyers that the second Gaon contract dated October 31, 1956, should, in any event, be decided in favour of the buyers, but I doubt if I should have treated that contract differently, if I had accepted generally the sellers' argument. It would seem that the situation at Suez had worsened considerably at that date in fact, but to what extent to the knowledge of the parties at the time of contracting, does not seem sufficiently clear to justify a discrimination.

I would dismiss both the appeals.

Ormerod L.J. The contract in each of these cases was in the same form, and, with the exception of one of the findings in the case stated in what has been referred to as the "Tsak" case, there is no difference of substance in the considerations affecting them. By the consent of the parties the two appeals were heard together. It is convenient to deal with them together in this judgment apart from some mention of what has been called the "special finding" in the "Tsak" case.

None of the contracts contained any express provision as to the route to be followed. The sellers, therefore, based their argument to a very large extent on the submission that there must be implied a term that the customary or usual route must be followed. It was not disputed that, at the time the contracts were entered into, the customary or usual route was through the Suez Canal. Before the time of performance the Canal had been blocked by the Egyptian authorities, and shipping by that route was therefore impossible. There was no finding that, at the time when the contract should have been performed, any other customary or usual route had been established, although there was an alternative route available by the Cape, by which goods could be shipped from Port Sudan to their respective destinations in Europe.

The sellers had in each case submitted to the judge at the trial that there should be implied a term that the goods would be shipped via Suez. In neither case had this submission found favour, and it was not pressed by the sellers in this court. It was, however, strongly submitted by Mr. Roskill on behalf of the sellers that a term should be implied that the goods would be carried by the customary or usual route, that this route was via Suez, and, as it was not available at the time of performance, the contracts were thereby frustrated. He submitted that the fact that an alternative route was available was immaterial. If the customary or usual route was not available at the time of performance the contract was thereby frustrated.

The buyers did not dispute that a contract of this kind implied in the ordinary way a term that the goods would be taken by the customary or usual route. But it was submitted that this only applied if there was such a route available, and that if in the absence of such a route there was left a practicable or common-sense route the contract must be taken to imply that the carriage must be by that route. So far as the parties knew, the Canal was open for traffic at the time when the contracts were made, but the question arises whether that is the date to be considered.

In *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*,[11] the first of the cases arising out of the Suez crisis to come before the court, McNair J. said[12]: "In principle, it seems to me that where a "contract expressly, or by necessary implication, provides that "performance, or a particular part of the performance, is to be "carried out in a customary manner, the performance must be "carried out in a manner which is customary at the time when "the performance is called for. This is particularly so in the "case of forward contracts like many c.i.f. contracts which call "for performance at some future date, when one bears in mind "that in mercantile matters custom and usage are subject to rapid "change: see the speech of Lord Wright in *Reardon Smith Line* "*Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[13]" I agree with this opinion as expressed by McNair J., and it follows that these appeals must be considered in relation to the conditions existing at the date when the contracts were due for performance, and not when they were made.

[11] [1959] 1 Q.B. 131.

[12] Ibid. 145.

[13] [1939] A.C. 562; 55 T.L.R. 929; [1939] 3 All E.R. 444, H.L.

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There would seem therefore to be two questions to be considered: (1) In view of the fact that no customary or usual route was available at the time of performance, were the contracts frustrated? If the answer to this question is "Yes" then, of course, it is the end of the matter. But if the answer be in the negative, then (2) would shipment of the goods by the alternative route via the Cape be sufficient performance under the contracts? Ashworth J., in his judgment, addressed himself to the proper question when he said[14]: "In my judgment, in considering "whether a contract of this type has been frustrated by the disappearance of the usual or customary route, one has to decide "(inter alia) whether an alternative route existed, and, if so, "whether performance by that route would 'render it a thing "'radically different from that which was undertaken by the "'contract' to quote the words of Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham U. D. C.*"[15]

In dealing with the first question, Mr. Roskill cited the well-known passage from Kennedy on C.I.F. Contracts, 2nd ed., p. 39: "In the absence of express terms in the contract the customary "or usual route must be followed." Mr. Roskill agreed that this passage in Kennedy was the only authority for the proposition with the possible exception of the judgments in *In re L. Sutro & Co. and Heilbut, Symons & Co.*[16] This was a case of a c.i.f. contract made in 1916 for the sale of rubber to be shipped "by "vessel or vessels (steam or motor) from the East to New York "direct and/or indirect, with liberty to call and/or tranship at "other ports." The sellers made a declaration under the contract for the shipment of 15 tons to Seattle, a port on the Pacific coast, whereby they would go to New York by train. It was held by this court, Scrutton L.J. dissenting, that the proposed route was inconsistent with the terms of the contract, which was a contract for the carriage of goods by sea and not by land. In my judgment, this case does not help the sellers. It was dealing with a proposed route which was different in kind from anything contemplated by the buyers. The authority of the passage in Kennedy, however, has not been questioned by the buyers in these cases, nor, indeed, by the court.

But Mr. Roskill seeks to go further and say that if the usual route cannot be followed for reasons for which the parties cannot be held responsible, then the contract must be at an end. This is tantamount to saying that it was a term of the contract that the goods should be shipped via Suez. It means that the parties must be taken to have said at the time they entered into the contract: "It is agreed that these goods shall be shipped by the "customary or usual route provided that it is available at the time "of performance. If it is not, the contract is at an end even "though there is an alternative practicable route available." That such would be the mind of the parties seems to me to be most unlikely, and I can find no reason for the implication urged by Mr. Roskill. In my judgment, the proper implication is that the goods should be sent by the alternative route provided that performance by that route would not "render it a thing radically "different from that which was undertaken by the contract."

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[14] Ante, p. 345.

[15] [1956] A.C. 696, 729.

[16] [1917] 2 K.B. 348.

In *Green's* case McNair J. said[17]: "I feel no doubt at all "that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, "that to impose upon the sellers the obligation to ship by an "emergency route via the Cape would be to impose upon them a "fundamentally different obligation which neither party could, "at the time when the contract was made, have dreamed that "the sellers would be required to perform and that, if the parties "to the contract had thought of the matter at the time, both, "as reasonable men, would have accepted at once that, if the "Canal was closed for an indefinite period at a time when "the sellers were not in breach for failure to ship earlier, the "contract would be off."

Like my brethren and Ashworth J., I differ with reluctance from the view of a judge with such great experience of this branch of the law, but I have come to the firm conclusion that the second question should be answered in the affirmative, and that shipment by the Cape route would not be a performance radically different from that undertaken by the contract. It is true that the distance is much greater, and the expense would be increased, particularly if shipment was delayed, as we were told that freights were increased as time went on, but these matters of themselves are not necessarily sufficient, in my judgment, to transform the nature of the undertaking in the manner submitted by Mr. Roskill. The views of the commercial men engaged in these arbitrations are helpful in considering this problem, and it is significant that they all take the view that shipment round the Cape would be a proper tender under these contracts. I would dismiss both the appeals.

It remains to refer to what has been described as the "special

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[17] [1959] 1 Q.B. 131, 149.

"finding" in the "Tsak" case. Paragraph VI of the findings of the case stated reads as follows: "The performance of the con-"tract by shipping the goods on a vessel routed via the Cape of "Good Hope was not commercially or fundamentally different "from its being performed by shipping the goods on a vessel "routed via the Suez Canal." This finding appears only in the case stated in the "Tsak" case, and Diplock J. came to the conclusion that it was a finding of fact with which he should not interfere. He based his conclusion largely on the decision in *Jackson* v. *Union Marine Insurance Co. Ltd.*[18] In that case the question at issue was whether the time required to do the necessary repairs to a ship was so long as to put an end in any commercial sense to the adventure. It is to be noted that in *Jackson's* case [18] the issue was the single one of time, and the question the jury had to answer was really one of degree. That is not the case here. The arbitrator has found, presumably on all the facts before him, and on his own knowledge of the conditions of the trade, that shipment by the Cape would not be fundamentally different from shipment through Suez.

This finding appears to be decisive of the question whether the contract has been frustrated and, therefore, to involve a question of law, or at the least to be a question of mixed fact and law, and I would have thought that the judge would have been entitled to come to a different conclusion had he thought fit. However, I have already come to the conclusion that this appeal should be decided in the same way as the appeal from Ashworth J., and it is unnecessary therefore to consider the matter further.

I would dismiss both the appeals.

HARMAN L.J. I take *Gaon's* case first. The sellers there take four points: (1) There should be read into the contracts by implication the words "via Suez." (2) There should be read into the contracts by implication the words "by the usual and "customary route." (3) The exception clause absolves the shippers from delivery. (4) The closure of the Canal frustrated the commercial object of the adventure and operated as a solvent of the contracts.

As to (1). This was not pressed before us. It was rejected by Ashworth J. and, indeed, by all the judges who have considered these Suez cases. I need say no more than that I can see no excuse for writing in words which do not appear, and are not necessary either to the understanding or to the effectiveness of the contracts. They could only be inserted by invoking the doctrine of rectification which, on the facts, could not be supported.

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[18] L.R. 10 C.P. 125.

As to (2). It was conceded in the court below, and I think admitted before us, that these words are to be read in ordinary circumstances into c.i.f. contracts. Where the parties differed was that the sellers argued that, where the usual and customary route proved to be unavailable at the time when performance of the contract became due, the contract was automatically at an end because their only obligation was to ship by the customary route and no other, while the buyers' case was that where the usual and customary route was, for whatever reason, unavailable at the time of performance, that did not of itself absolve the sellers, who remained bound to ship the goods by any alternative route which was available, so long as that route was not altogether outside what must be supposed to be the contemplation of the parties. For myself I feel some embarrassment at this argument. It assumes that there is some magic about shipping contracts and that the ordinary rules do not apply. I am unwilling to accept this. The contracts here by their express terms bound the sellers to sell the goods to the buyers, and to deliver them by ship sailing within a fixed period to a European port, nothing being said about the port of departure, though the conditions annexed were appropriate to dispatch from a West African port. It was, however, agreed that both parties would know that an East African port was intended and that Port Sudan was the only such port available for the export of these goods. The sellers' duty, therefore, was to ship the goods from Port Sudan to the named Mediterranean port by a ship leaving within the given period. Why it should be necessary to imply such words as "by the usual and "customary route," I do not see. No doubt, as the case stated finds, both parties assumed that the goods would be shipped via Suez, that being the obvious way in normal circumstances. No doubt also it was for the sellers to ship by the route most likely to effect their obligation within a reasonable time, and this would normally involve shipment by the customary route because shipment by some other route would not be reasonable and, therefore, would not be performance of the contract. It might be, of course, that it was essential for the buyer to receive the goods within a given time, which could only be done by sending them via Suez; moreover, the goods might be of a nature which would not stand a route twice crossing the Equator. Considerations of this sort would require express mention in the contracts unless, indeed, evidence were available to show that both parties knew of them.

There is not a word of such evidence and, in any event, it would not lie in the sellers' mouth to allege as an excuse for not shipping the goods provisions which could only be inserted or implied in order to protect the buyer to whom the choice between the two routes was a matter of indifference. Mr. Roskill's argument had the merit of simplicity, but in effect it is the same as argument No. (1) above. It goes like this: The route must be the usual and customary route; the only such route mentioned in the case is the Suez route; no one suggested that the Cape route had become the usual and customary route at any relevant time; therefore, the only obligation on the seller was to ship by Suez, and, that having become impossible, he is relieved of his bargain. This, in effect, is to write " via Suez " into the contract, and it is therefore the same as argument (1) which I have already rejected.

As to (3). The exceptions clauses in these contracts raise once more exactly the same point. They speak of force majeure preventing the shipment within the time fixed. Now if " shipment " means placing the goods on a ship bound for the right destination, as I think it must, and if by the contract the destination may only be reached through Suez, then shipment became impossible when the Canal closed because there was no ship destined for the Mediterranean ports via the Canal, and this would represent force majeure preventing the shipment. If, however, you are not to write " via the Canal " into the contracts, there is no prevention because the evidence shows quite clearly that goods were being shipped during the contract period from Port Sudan to European destinations via the Cape, and that this route was available to the shippers who, in fact, freely availed themselves of it under other contracts.

As to (4). Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or unprofitable, but it is very rarely relied on with success. It is, in fact, a kind of last ditch, and, as Lord Radcliffe says in his speech in the most recent case (*Davis Contractors* v. *Fareham U. D. C.*[19]), it is a conclusion which should be reached rarely and with reluctance. The doctrine used to be spoken of as that of " frustration of the " adventure," which seems to me to be more accurate than the modern expression " frustration of the contract." I agree with Sir David Cairns' submission that frustration is of two kinds; one brought about by the physical impossibility of performance as in *Taylor* v. *Caldwell*,[20] where the commercial adventure was a

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[19] [1956] A.C. 696, 727.

[20] (1863) 32 L.J.Q.B. 164.

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performance in a building which did not exist when the time came for it; or in the coronation cases, where the object of the adventure was to provide a view of a coronation procession which did not proceed; and, secondly, where the adventure is frustrated by the mere passage of time as in *Jackson's* case,[21] or in *Bank Line Ltd.* v. *Arthur Capel & Co.*[22] In both these cases the voyage which was the subject-matter of the adventure could eventually be undertaken, but at a distance of time so far removed from that contemplated by the contract that it was a different thing altogether.

I have always favoured the view that this doctrine when analysed proves to depend on the true construction of the contract. A man may only be released under this doctrine if he can truly say with the Virgilian hero " Non haec in foedera veni "—as we were reminded at the Bar—" This was not the bargain I made." The contract properly construed does not provide for the event which has happened and is therefore not binding because it has no application. Hardship or unexpected expense falling on one of the parties to a commercial adventure can never excuse him from it so long as the adventure remains recognisably that upon which the parties embarked.

The appeal tribunal which stated the case here, after finding as a fact that the sellers could have shipped the contracted goods within the contract period, and that it would have been more expensive to ship via the Cape rather than via the Canal, concluded that this did not make the performance of the contracts commercially impossible. This last is, I think, a conclusion of law from the facts found and is not binding upon this court, but the opinion expressed must necessarily be of great weight because it is the opinion of commercial men well acquainted with the situation. It was said that this impossibility is a question of degree, and in so far as it is, the question is one of fact, but in the end the question of frustration or no is one for the court, and in my judgment Ashworth J. came to a correct conclusion and one with which I agree.

I must face the fact that this involves disagreeing with the decision of McNair J. in *Green's* case,[23] for I cannot see any distinction between that case and this. Both arise out of the same events; both concern c.i.f. contracts, and, though the form of the contracts and their dates differ to some extent, I do not

[21] L.R. 10 C.P. 125, Exch.Ct.

[22] [1919] A.C. 435; 35 T.L.R. 150, H.L.

[23] [1959] 1 Q.B. 131.

think the differences are relevant. It is true that in *Green's* case [23] the contract was made on September 6 when, perhaps, the storm clouds did not so far cover the horizon as at the dates involved in the instant case, namely, October 12 and still more October 31, but it was found as a fact that on October 12 the parties still assumed that the Canal would be available. There is no such finding as to October 31, by which time hostilities likely to affect the Canal had already begun, but there is nothing to justify the view that the Cape route was even then contemplated. I do not feel that *Green's* case [23] can be distinguished on the mere ground of difference in date.

I admit that dissent smacks of temerity, but I am consoled by the fact that all the commercial arbitrators have negatived frustration, and that McNair J. alone among the judges who have considered the problem was of the other opinion. This opinion when questioned proves to depend on a mere consideration of the length of the voyage. This, no doubt, was an important difference, and after November 9 involved the sellers in an unexpected expense, but as I have already pointed out, neither the date of arrival nor the physical circumstances of the voyage can be supposed to be circumstances vitally affecting the practicability of the adventure. Both these events affect the interest of the buyer and are indifferent to the seller, who is not warranted in sheltering behind them in order to save, what is alone affected, his pocket.

The case shows clearly that trade in these goods between these ports was not stopped by the closure of the Canal; it was merely diverted, and I am quite unable to agree that the doctrine of frustration can relieve the sellers from their obligations.

I would dismiss this appeal.

As to the Tsakiroglou case, Diplock J. did not feel himself at liberty to consider whether he would have treated it as a case of frustration. Having concurred in the findings of McNair J. in *Green's* case [24] so far as the time of performance is the relevant one and not the time of the contract, he found himself confronted by what has been called the "special finding" of the appeal board in paragraph 12 (vi) of the case stated. I need not repeat the words of this special finding, which the judge treated as a finding of fact like an answer given by a jury in answer to a judge's charge. The judge therefore treated himself as bound by this finding, and, interpreting it as being equivalent to a finding that the adventure was not frustrated, he held himself bound to accept it. I do not think I should have taken this view. The finding seems to me to be, in fact, the expression of an opinion to the effect that the one voyage was not commercially or fundamentally different from the other. At the highest it was, I think, the finding of a secondary fact, namely, an inference from the primary facts. Such an inference is, as I understand it, open to review in an appellate court. In my judgment, therefore, the judge should have treated himself as free to express his own opinion on this question. Had he done so he might have felt bound to follow McNair J. This case, however, if the special finding be ignored, seems to me indistinguishable from Gaon's case, in which Ashworth J. refused to follow McNair J., a decision with which I agree.

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[23] [1959] 1 Q.B. 131.

[24] [1959] 1 Q.B. 131.

In my judgment, therefore, Diplock J. came to the right conclusion, though by a different and mistaken route.

Appeals dismissed with costs.

Leave to appeal to the House of Lords on terms imposed on the sellers.

Solicitors: *Richards, Butler & Co.; Bernard Samuel Berrick & Co.; Rowe & Maw.*

I. G. R. M.

STEPHENS *v.* CUCKFIELD RURAL DISTRICT COUNCIL.

[1958 S. No. 97.]

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May 12, 13; *June* 2.

Hodson, Pearce and Upjohn L.JJ.

Town and Country Planning—Maintenance of waste land—"Garden, "vacant site or other open land"—Car breaker's yard in curtilage of building—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 33 (1).

Statute—Construction—Meaning of word—Word unsuitable for judicial interpretation—Lack of guidance from context—"Garden, vacant "site or other open land"—Town and Country Planning Act, 1947, *s.* 33 (1).

The plaintiff was the owner of a piece of land on part of which, in about 1939, he erected structures for the purpose of a sawmill; the land surrounding the structures was used as a sawmill yard. In 1955 the use as a sawmill was abandoned and the land was let to car breakers, who used the surrounding yard of the premises as well as the old sawmill for car breaking. In 1957 the defendants, the local authority, served a notice on the plaintiff purporting to be pursuant to section 33 of the Town and Country Planning Act, 1947, stating that the condition of the open land within the curtilage of the premises was causing serious injury to the amenity of the district and ordering the removal from the land of all cars, car bodies and machinery. The plaintiff claimed a declaration that the land within the curtilage of his premises referred to in the notice was not "a garden, vacant site or other open land" within the meaning of section 33, and that the notice was of no effect in law:—

Held, (1) that when Parliament used ordinary words such as "garden, vacant site or other open land," it was inappropriate to try to define them further by judicial interpretation and to lay down as a rule of construction the meaning of such words unless the context required that some special or particular meaning should be placed on them; and the juxtaposition of these phrases in section 33 (1) did not require any special or particular meaning to be placed on them.

Bath v. *British Transport Commission* [1954] 1 W.L.R. 1013; [1954] 2 All E.R. 542, C.A. applied.

(2) That whether a piece of land was properly described as a "garden," "vacant site" or "open land" was a question to be determined in all the circumstances of each case; and a rule of construction should not be laid down which defined the phrase "open land" as necessarily including all unbuilt on land not surrounded by other buildings, or necessarily excluding an open space merely because, by being enclosed by a ring fence, it might be described as part of the curtilage; in the present case on looking at the matter as a whole this plot could not be described as open land for the purposes of section 33 (1) of the Act.

Decision of Lord Parker C.J. [1959] 1 Q.B. 516; [1959] 2 W.L.R. 480; [1959] 1 All E.R. 635 affirmed.

APPEAL from Lord Parker C.J.[1]

The plaintiff, Horace John Stephens, had for many years been the owner of a plot of land approximately 200 feet square in part of Tilgate Forest at Pease Pottage in the County of Sussex. About 1939 or 1940 he erected timber and metal buildings with iron roofs on this plot of land; and he used such buildings and the remainder of the plot as a sawmill for the purpose of cutting up wood hewn from the surrounding forest from that time until about June, 1955, when he ceased to use it for that purpose and let it to a company for the purposes of a car breakers' business.

By his statement of claim the plaintiff stated that from about November, 1955, until November 6, 1957, he let the land to one Smith Goodwin for use by Sussex Car Breakers Ltd., in the course of their trade, and from November 7, 1957, the land and premises were leased to that company for 21 years from November 2, 1957, to store vehicles and vehicle spare parts and/or for use as a vehicle workshop and offices in connection therewith. By a deed of variation dated November 21, 1957, the lease was varied so as to add to the purposes for which the land and premises could be used, the dismantling or breaking up of vehicles and/or the adapting for sale of any component parts thereof. The land in question was surrounded on three sides by other land belonging to the plaintiff and on the fourth side was bounded by a public road.

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[1] [1959] 1 Q.B. 516; [1959] 2 W.L.R. 480; [1959] 1 All E.R. 635.

At some time before April, 1957, the plaintiff enclosed this plot of land with a wire fence and concrete posts; but it appeared from the photographs that operations carried on by his tenants were very unsightly.

The defendants, the Cuckfield Rural District Council, who were the local planning authority for the district, on April 3, 1957, served a notice, dated April 2, 1957, on the plaintiff purporting to be a notice under section 33 of the Town and Country Planning Act, 1947,[2] which related to this land. That notice, inter alia, stated: " It appears to the said district council in the exercise " of their delegated powers that the condition of open land within " the curtilage of premises to the north of Parish Lane, Pease " Pottage, in the rural district of Cuckfield . . . is causing serious " injury to the amenity of part of the area of the said rural " district. The said district council in accordance with section 33 " . . . require for the purpose of abating the injury to the amenity " of the area within six weeks of the date on which this notice " takes effect such steps as are specified in the schedule hereto " shall be taken." The schedule stated: " Remove from the said " land all cars, car bodies and machinery." The plaintiff appealed to the magistrates' court for Haywards Heath who dismissed his appeal on August 12, 1957; he appealed from that decision to East Sussex Quarter Sessions, and from the dismissal of that appeal by way of case stated to the Divisional Court, which appeal was also dismissed. It was common ground that those courts had no jurisdiction to consider the point now before the court.

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[2] Town and Country Planning Act, 1947, s. 33 (1): " If it appears to a " local planning authority that the " amenity of any part of the area of " that authority, or of any adjoining " area, is seriously injured by the " condition of any garden, vacant site " or other open land in their area, " then, subject to any directions given " by the Minister, the authority may " serve on the owner and occupier of " the land, in the manner prescribed " by regulations under this Act, a " notice requiring such steps for abating the injury as may be specified " in the notice to be taken within " such period as may be so specified."

By the present action the plaintiff had claimed a declaration that the land to which the notice related was not a "garden, "vacant site or other open land" within the meaning of section 33 of the Act of 1947, and that the notice served by the defendants on the plaintiff on April 3, 1957, was of no effect in law. Lord Parker C.J. held that, on the true construction of section 33 of the Act of 1947, the words "garden, vacant site or other open "land" had to be limited to a garden, vacant site or other open land which, at any rate, was not within the curtilage of a building; and as, in the present case, the notice specifically referred to open land within the curtilage of the premises, the notice was a nullity.

The local authority appealed from that decision.

J. P. Widgery Q.C. and *Alan Fletcher* for the defendant local authority. A local authority may use section 33 of the Act to rectify any injurious condition of the land, although the result will be to stop the use to which the land is put; that is subject to the one exception that where the use is one for which permission was granted under Part III of the Act section 33 may not be used.

The Act was intended to prevent injury to amenity. Public Health powers exist which give power to prevent activities injurious to health without payment of compensation; this is an extension of that principle to amenity; in the case of a factory chimney belching forth black smoke, a smoke abatement notice could always have been served even if it had the effect of causing the business to close down. This is a similar case. The local authority orders the owner to clear up the land and says that its injurious state must be abated, whether or not this causes the business to close. The judgment of Lord Parker C.J. in the court below was coloured by the idea that Parliament could not have intended a business to be closed without payment of compensation, but there is no reason why this should not be so.

Considering the individual words of the section, would the draftsman have chosen to use the unqualified word "garden" if he had meant land not within the curtilage of a building, since gardens are nearly always within the curtilage of a building. In the context it must mean land which is open to view, otherwise it would be a foreign phrase.

Section 26 of the Act, which concerns the power to require the alteration of the use of land, is not inconsistent with section 33; they are directed to different ends. Section 26 may be used, for example, to decentralise an inoffensive industry, and in such a case compensation would, of course, have to be paid.

There is an even stronger reason why section 33 may be used here: section 23 (4) (*a*) (as adapted by regulation 7 of the Town and Country Planning (General) Regulations, 1948, which were made under section 33 (2)) recognises that a notice under section 33 cannot be used where permission has been granted under Part III; in other words, a local planning authority cannot give permission for a use one week and tell the developer to clear up his land the next week. It must follow that the converse is true when permission has not been granted for a use. If that were wrong, any person served with a notice under section 33 could say that the use of his land was not unlawful, and as the injury to amenity resulted from that use, section 33 could not be used.

There is nothing to suggest that land within the curtilage of a building is to be treated differently from other land, and there is nothing to show why a car breaker with a building on his land should be exempt from action under the section, as a car breaker without a building on his land could be served with a notice. None of the words suggest that association with a building is a relevant test. The opening words shed light on the meaning of "other "open land"; everyone knows what a garden is.

This is a question of principle. If land associated with buildings is to be excluded from the operation of section 33, then all the force goes out of the section.

[UPJOHN L.J. On your construction the local authority could come down on a factory owner and tell him to clear away the weeds on land around the factory?]

Yes, the effect would be to say that the authorised use of the land must be carried on tidily.

G. G. Baker Q.C. and *Ronald M. Bell* for the plaintiff. If the section meant any land open to public view and not covered by a building, then why did it not say so? The section should not include land within the curtilage of a building. Land within the curtilage of a building is just as much a part of the building as a room in the building; as to the meaning of curtilage, see *Walsh*

v. *Allweather Mechanical Grouting Co. Ltd.*[3]; *Sinclair-Lockhart's Trustees* v. *Central Land Board*[4]; and *Caledonian Railway Co.* v. *Turcan.*[5] No question arises here whether the land is within the curtilage as the notice states that it is within the curtilage of the premises.

[UPJOHN L.J. Does curtilage have anything to do with it?]

It is argued that this land is within the curtilage of the buildings and so becomes part of them: *Sampson's Executors* v. *Nottingham County Council.*[6] It is sufficient for the plaintiff's purposes to say that open land cannot mean land which is within the curtilage of a building, and if this is within the curtilage of a wall or fence, it is equally a building and therefore it cannot be open land within the intention of the section.

The regulations made under the Act cannot in any way enlarge the scope of section 33 (1), and section 23 cannot be used against this car breaking business. The Act is silent in respect of pre-1948 use; a person may carry on what he was doing before but he may not carry on a different use. The previous use as a sawmill was a perfectly lawful use, and if that use was continuing today, section 33 could not be used to stop any activity in the shed or outside the shed. The defendants' argument below was that the use had been changed from a sawmill to that of a car breaker, and that the land was not therefore protected. But the argument is now that all use that can be seen can be attacked under the section.

Under the Town and Country Planning (Use Classes) Order, 1950, this use is a general industrial use which is perfectly lawful. The change from use as a sawmill to a car breaker's business does not change the use from being a general industrial use. This is a back-handed attempt to close down the plaintiff's activities.

[HODSON L.J. Why back-handed?]

Because this has never been done before under this section; it could be used in the case of a rubbish dump or a bombed site that had gone to rack and ruin, but the plaintiff is carrying on a perfectly lawful activity and the only way to stop it would be under section 26, when compensation would be payable; this is an attempt to do so without paying compensation. It has been said time and again that if a man is to be dispossessed of his land, the clearest words should be used. This is a wrong use of the section which was never intended for this purpose.

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[3] [1959] 2 Q.B. 300; [1959] 3 W.L.R. 1; [1959] 2 All E.R. 588, C.A.

[4] (1950) 1 P. & C.R. 195; 1950 S.L.T. 283.

[5] [1898] A.C. 256, H.L.

[6] [1949] 2 K.B. 439; 65 T.L.R. 376; [1949] 1 All E.R. 1051, D.C.

Bell following. The section has never been used in the case of land within a building. It is emphasised that section 33 is in Part III of the Act, which is concerned with development of land; the central section of it is section 12, under which the Use Classes Order, 1950, was made. The importance of that for this case is that under the Use Classes Order this is a general industrial building, and the land round this structure is part of that general industrial building; and it would be absurd to say that it is open land for the purposes of the same class of thing for which it is a general industrial building; Lord Parker C.J. virtually said so in his judgment.[7] It should be remembered that in a general industrial use a person can, subject to the law of nuisance, make a nuisance of himself. Whichever way this is looked at it is not open land.

Widgery Q.C. in reply. It was argued that this is a general industrial building, and that it would be absurd to say that it is open land; there is, however, nothing in the Act to say that this is general industrial land, and it is quite wrong to say that this is a general industrial building, although it may for special purposes be industrial.

As to the argument of the pre-1948 user, that was not pleaded; what was pleaded was that it was not open land. The argument that Parliament could not have intended to restrain pre-1948 use is very much on the fringe of this case. The question really is what is the meaning of these words "other open land" in the association in which they are used in the section. The context in which these words appear is "garden, vacant site or other open "land," and if they are influenced by the words which precede them, although it is not strictly ejusdem generis, "other" means open land rather like a garden or vacant site, and "open land" means land having the quality of openness of a garden. If that be right the argument about curtilage fails.

Cur. adv. vult.

June 2. UPJOHN L.J. read the judgment of the court: This appeal raises a short question of construction on section 33 of the Town and Country Planning Act, 1947 (which we shall call "the Act"). The question is whether certain land belonging to the plaintiff is properly described as "a garden,

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[7] [1959] 1 Q.B. 516, 526.

"vacant site or other open land" for the purposes of that section. [His Lordship stated the facts and read section 33 (1) of the Town and Country Planning Act, 1947, and continued:] This section is in Part III of the Act, which is headed "Control of development, etc." Section 12 is the first section in that Part and provides that permission shall be required in respect of any development of land carried out after the appointed day (July 1, 1948). Subsection (2) further defines the meaning of the expression "development" and provides, inter alia, that the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such should not involve development of the land. Then follow a number of sections dealing with applications for planning permission and appeals and so forth.

Section 23 empowers the local planning authority to serve enforcement notices where development of land has been carried out after the appointed day without the grant of permission. Section 26 and the following sections down to 34 are in a section of Part III headed "Additional powers of control." Section 26 provides that the local planning authority, if they deem it expedient to do so in the interests of the proper planning of their area, may serve notices directing that the use of land should be discontinued, and section 27 provides that in such a case the owner of the land must be compensated by the local authority.

It is not in dispute that under the Town and Country Planning (Use Classes) Order, 1950, when the building and the land surrounding it was used as a sawmill both the building and the surrounding land used for the like purpose was a "general "industrial building" for the purposes of that order. Furthermore, it is common ground that its use now as a car breakers' yard does not change its character from a "general industrial "building" and therefore under the provisions of the Act no development permission was required when the sawmill business was abandoned and the car breakers' yard took its place. It cannot be doubted, therefore, that the plaintiff by his tenants is entitled to carry on that business upon that land, without obtaining planning permission.

In the court below Lord Parker C.J. expressed the view that the prima facie meaning of "open land" in section 33 covers operations on or user of any open land in the sense of land which is not built upon. He was to some extent influenced by the Town and Country Planning (General) Regulations, 1948, made by the Minister under section 33 of the Act, which showed that in the view of the Minister "open land" might include land upon which some business was carried on. We doubt very much whether it is right to construe the words of the section by reference to regulations made under powers therein contained, especially when such regulations are directed solely to procedural matters such as conferring rights of appeal in certain limited circumstances from an order of the local authority.

Nevertheless, looking at the section as a whole, and despite the marginal note to which reference is made later, we agree with the Lord Chief Justice that unbuilt on land upon which business is carried on is not necessarily excluded from the definition of "open "land" for the purposes of the section. However, he accepted the argument of Mr. Baker, for the plaintiff, that although the literal interpretation of "open land" might be "unbuilt on "land," yet by reason of the earlier sections in Part III which we have briefly summarised, Parliament could not have intended the section to operate in such an absurd way so as to empower a local authority by invoking it to bring in effect to an end activity on the land which required no development permission and could only be brought to an end under section 26 upon payment of compensation. He therefore came to the conclusion that section 33 properly construed must be limited to a case where a garden, vacant site or other open land is not within the curtilage of a building. He put it in this way[1]: "It seems "to me here that, in order to make sense of this scheme "of legislation, and to avoid the absurdity to which I have "referred, one must limit the words, 'garden, vacant site "'or other open land' to a garden, vacant site or other open "land which is, at any rate, not within the curtilage of a building. "I appreciate that that may give rise to questions in some cases "as to what is, and what is not, within the curtilage of a "building, and indeed, as I said, it may be that the curtilage is "not the right test, but that the test is whether, as in the Use "Classes Order of 1948, the land is occupied with a use for the "same purposes as the building; but so far as the present case "is concerned, there is no difficulty, because in the notice itself "to which I have referred it is specifically dealing with the "condition of open land within the curtilage of those premises." Accordingly, Lord Parker decided the case in favour of the plaintiff.

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[1] [1959] 1 Q.B. 516, 526; [1959] 2 W.L.R. 480; [1959] 1 All E.R. 635.

We do not think that Lord Parker C.J. intended to lay down as a rule of construction of the section that the phrase "other "open land" cannot include unbuilt on land within the curtilage of a building. We think that he did no more than consider the test of being within a curtilage as being a useful test in the circumstances of the case before him.

However, before us, Mr. Widgery, for the local authority, has submitted that "other open land" in section 33 means necessarily, and as a rule of construction, land which is not surrounded by a building. He so submits, because he says that a "garden" may be surrounded by a high wall or hedge but it has a quality of openness in that it is not normally surrounded by a building. Then he says a "vacant site" may be a site vacant because it has not yet been built upon or because it may no longer have a building upon it. There again it has the quality that it is not built upon and is not normally surrounded by a building. So he argues "open land" must have the same quality as the garden or vacant site for it is introduced by the qualification "other." Therefore it is sufficient to satisfy the description "open land" that it should not itself be built upon or surrounded by buildings. He further points out that as a garden is normally within the curtilage of a house it would be very extraordinary if "other open "land" was construed to exclude as a principle of construction open land within the curtilage of a house or building.

It is the duty of the court to interpret the language in which Parliament has thought fit to enact statutes and in particular to resolve verbal obscurities, ambiguities or grammatical difficulties and to explain the meaning of words and phrases. Authorities on rather similar words in other Acts passed for entirely different purposes (such, for example, as Part V, paragraph 2 of Sched. I to the Law of Property Act, 1925) do not assist us. In this case, however, there are no relevant obscurities, ambiguities or grammatical difficulties. The sole difficulty lies in the meaning of the phrase "open land" when used in conjunction with the words "garden" and "vacant site."

But when Parliament uses ordinary words such as these, which are in common and general use in the English language, it seems inappropriate to try to define them further by judicial interpretation and to lay down as a rule of construction the meaning of such words unless the context requires that some special or particular meaning should be placed upon such words. The juxtaposition of these phrases together in section 33 does not, in our view, require that any special or particular meaning should be placed on any of them. As Somervell L.J. said, in relation to section 25 (3) of the Factories Act, 1937, in *Bath* v. *British Transport Commission*[2]: " . . . if they are, as these words are, perfectly " familiar, all one can do is to say whether or not one regards " them as apt to cover or describe the circumstances in question " in any particular case." These observations were cited with approval by Sellers L.J. recently in *Kimpton* v. *Steel Company of Wales Ltd.*[3]

In our judgment, whether a piece of land is properly described as a " garden " or " vacant site " or " open land " for the purposes of the section is a question to be determined in the circumstances of each case, and the court whose duty it is to decide it must exercise its common sense upon the matter. While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind. In this case it is " Power to require " proper maintenance of waste land, etc."

We do not think it right to lay down as a rule of construction a definition which necessarily includes in the phrase " open land " all unbuilt on land not surrounded by other buildings and would include, for example, a yard at the back of a factory where goods may be temporarily placed. Equally we would refuse to lay down another definition which necessarily excluded from that phrase a spacious park surrounding a mansion house merely because by reason of being enclosed within a ring fence it might properly be described as part of the curtilage.

Whether land satisfies the description of " open land " must be treated as a question to be answered by a consideration of all the relevant circumstances of the case.

In this case the plot of land in respect of which the notice has been served is open to the air and unbuilt upon, but it is fenced and used for the purposes of a business of a car breakers' yard some part of which business is carried on within a building which this piece of land surrounds.

None of these circumstances is in itself decisive of the matter, but each points to the conclusion which we reach without much difficulty on looking at the matter as a whole that this plot

[2] [1954] 1 W.L.R. 1013, 1015; [1954] 2 All E.R. 542, C.A.

[3] [1960] 1 W.L.R. 527, 529; [1960] 2 All E.R. 274, C.A.

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cannot properly be described as open land for the purposes of the section.

The appeal is therefore dismissed.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co. for J. A. Churchill, Haywards Heath; Iliffe, Sweet & Co.*

I. G. R. M.

C. A.

1960
July 21, 25, 27.

Sellers, Pearce and Devlin L.JJ.

GLADSTONE v. BOWER.

[1958 G. No. 91.]

Agriculture—Agricultural holding—Tenancy—Protection—Letting of farm and land for period of 18 *months—Whether let for interest less than tenancy from year to year—Agricultural Holdings Act,* 1948 (11 & 12 *Geo.* 6, *c.* 63), *ss.* 2 (1), 3 (1), 23.

By an agreement in writing the landlord let to the tenant a farm and land for a term of 18 months. After the expiry of the term by effluxion of time the tenant failed to give up possession, contending, inter alia, that by virtue of section 2 of the Agricultural Holdings Act, 1948,[1] the agreement took effect

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[1] Agricultural Holdings Act, 1948, s. 2: "(1) Subject to the provisions "of this section, where under an "agreement made on or after the first "day of March, 1948, any land is let "to a person for use as agricultural "land for an interest less than a "tenancy from year to year, or a "person is granted a licence to "occupy land for use as agricultural "land, and the circumstances are "such that if his interest were a "tenancy from year to year he would "in respect of that land be the tenant "of an agricultural holding, then, "unless the letting or grant was "approved by the Minister before "the agreement was entered into, the "agreement shall take effect, with "the necessary modifications, as if it "were an agreement for the letting "of the land for a tenancy from year "to year: . . ."

S. 3 (1): "A tenancy of an "agricultural holding for a term of "two years or upwards shall, instead "of terminating on the expiration of "the term for which it was granted, "continue (as from the expiration of "that term) as a tenancy from year "to year, but otherwise on the terms "of the original tenancy so far as "applicable, unless, not less than one "year nor more than two years before the date fixed for the expiration of the term, a written notice "has been given by either party to "the other of his intention to terminate the tenancy."

S. 23 (1): "A notice to quit an "agricultural holding or part of an "agricultural holding shall (notwith-

and continued to take effect as an agreement for the letting of an agricultural holding for a tenancy from year to year, under which she was entitled to remain in possession. On the landlord's claim for possession and mesne profits:—

Held, that the lease for a fixed period of 18 months created an interest greater than "a tenancy from year to year" as those words must be understood in section 2 (1), and was accordingly outside the protection afforded to tenancies of agricultural holdings under the Act of 1948; and the landlord was entitled to possession without more.

Though, in the result, whether by design or as a casus omissus, there was no protection under the Act for short tenancies of more than one and less than two years, the expression "a tenancy "from year to year" in section 2 (1) meant the tenancy known to the common law by that expression, namely, a tenancy which created an interest with well-defined characteristics, and determinable by notice taking effect at the end of the first year. Nothing in the Act of 1948, nor in section 23, which merely placed limited fetters on the landlord's power to terminate tenancies by notice to quit, entitled the court, in an endeavour to give universal protection to tenancies of agricultural holdings, to construe that expression as meaning a tenancy from year to year as enlarged by the Act so as to be equivalent to a tenancy for two years (post, pp. 394, 395).

Land Settlement Association Ltd. v. *Carr* [1944] K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126, C.A. considered.

Decision of Diplock J. [1960] 1 Q.B. 170; [1959] 3 W.L.R. 815; [1959] 3 All E.R. 475 affirmed.

APPEAL from Diplock J.[2]

By an agreement in writing dated March 29, 1956, made between the landlord, Erskine William Gladstone, and the tenant, Alice Mary Bower, the landlord let to the tenant the messuage buildings, gardens, land and premises called the Manor Farm in the parishes of Hawarden and Saltney, Flintshire, "for the term "of eighteen months from the 1st day of November 1955 . . . "and terminating on the 1st day of May 1957, at the rent of "£550 for the said term." The tenant failed to give up possession of the farm on May 1, 1957.

The landlord claimed possession of the farm and mesne profits from May 1, 1957, until possession was given. The tenant contended that she was entitled to possession, inter alia, by virtue of

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"standing any provision to the con- "trary in the contract of tenancy of "the holding) be invalid if it pur- "ports to terminate the tenancy be- "fore the expiration of twelve months "from the end of the then current "year of tenancy: Provided that this "section shall not apply—(*a*) . . . "(*b*) . . ."

[2] [1960] 1 Q.B. 170; [1959] 3 W.L.R. 815; [1959] 3 All E.R. 475.

section 2 of the Agricultural Holdings Act, 1948, under which the agreement between the parties took effect as an agreement for the letting of the farm for a tenancy from year to year.

Diplock J., on October 9, 1959, held that the lease for 18 months was outside the protection of section 2 (1) of the Act of 1948, and that the landlord was entitled to possession. The tenant appealed.

Anthony Cripps Q.C., *J. G. Le Quesne* and *David Jackson* for the tenant. The letting of this agricultural land for 18 months was a letting "for an interest less than a tenancy from year to "year" within section 2 (1) and, accordingly, gives the tenant the security of tenure conferred by the Act of 1948. The comparison which subsection (1) calls for is that between the particular interest before the court and a letting "for use as "agricultural land" for a tenancy from year to year. When one looks to see what an agricultural tenancy from year to year means in the Act, one finds in section 23 (1) that it means, as it has meant since 1920 in agricultural legislation, something which lasts at least two years, subject to certain specific exceptions.

That suggested comparison compares like with like and fits into the scheme of an Act which was intended to give agricultural tenants greater security than they had at common law. Diplock J.'s decision that the comparison called for is that between the particular interest before the court and the common law year-to-year tenancy which might last only a single year, and that section 2 (1) does not cover the case of an 18-month tenancy, creates a gap in the protection afforded by the Act. The Act by section 2 (1) clearly covers leases up to one year, while section 3 covers leases of two years and upwards. It is unlikely that the legislature intended to leave unprotected leases of more than one and less than two years. Support for the submission that the Act intended to cover almost all cases of agricultural holdings is to be found in the proviso to section 2 (1), which protects licensees of agricultural land, whatever the period of the licence. It is unlikely that Parliament would have put a licensee in a stronger position than a tenant. Diplock J., in holding that section 2 (1) was enacted to remedy the situation created by the decision in *Land Settlement Association Ltd.* v. *Carr*[3] that a 364-day lease had escaped the protection of the earlier Agricultural Holdings Act of 1923, has unduly limited the scope of the subsection.

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[3] [1944] K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126, C.A.

Section 23 (1), which is relied on as showing that this tenancy is to be treated as one which lasts at least two years, is a section taken over from earlier agricultural legislation; but it is re-enacted in the consolidating Act of 1948, which gave much greater security to the agricultural tenant than did the Act of 1923, under which a landlord could always get rid of his tenant by giving notice to quit. For that reason the court should lean against a construction of section 2 (1) which creates a gap in the protection, when another interpretation is available which gives the wider protection.

Another factor for consideration is that this particular legislation is dealt with largely by arbitration, and is aimed not only at the legal profession but also at estate agents. If an 18-month tenancy is held to be unprotected, every properly advised landlord will grant 18-month tenancies only, in order to retain control; it would become optional whether the parties should have security or not; and the extensive provisions as to ministerial approval for terminating agricultural tenancies would be rendered superfluous.

The case was argued before the judge and is argued here on the basis that 18 months is " a term of years " within the definition in section 94 (1), as distinct from something less than a term of years and so (since 18 months is not a periodic tenancy) outside that definition altogether. Neither party felt able to argue on any other basis, or feels able to do so now. If, however, that basis is not accepted, the tenant is not within the Act of 1948 at all and would have no security of tenure under that Act. She would then be within the protection of the Landlord and Tenant Act, 1954, and entitled to some compensation; but both parties have felt compelled to contend that the case should be dealt with under the Act of 1948, and it does in fact suit both parties to do so.

Lionel A. Blundell Q.C. and *V. G. Wellings* for the landlord. The landlord relies on the reasoning of Diplock J. set out in his judgment. The question whether fixed terms of between one and two years were simply overlooked by Parliament needs to be approached historically in order to see how the provisions of the Act of 1948 grew out of the earlier Act of 1923.

[SELLERS L.J. That does not appeal to me. When there is a new Act, it is intended to do something new.]

It is useful to look at the original sections on invalidating notices to quit. The Act of 1923 recognised only the desirability of all farmers having 12 months' notice. The Act of 1948 has annexed the security of tenure to the notice to quit, and ministerial approval is now required before or after the service of the notice. But there is nothing to support the submission that Parliament intended to confer the same benefit on a person who, with his eyes open, takes a lease of agricultural land for a fixed term of so short a duration that it is of no farming significance.

[DEVLIN L.J. Yet a person who takes for less than a year is clearly protected?]

That is due to the discovery in 1944 of a loophole in the Act of 1923 in relation to the 364-day tenancy in the *Land Settlement Association* case [3]; and section 2 (1) was intended to close that loophole. That was accepted obiter by this court in *Reid* v. *Dawson* [4]: see *per* Denning L.J.[4] It is in line with the history of this statutory protection, which has come about piecemeal.

[DEVLIN L.J. Your argument is tending to say that when Parliament used the expression " term of years " in section 94 (1) it meant precisely what it says, namely, at least two years. If that is so, you ought to be arguing that 18 months is not " a term " of years " within the definition in section 94 (1), and I am not sure whether this court ought to permit you to say that it is " a " term of years " merely because it is more convenient to do so.]

That question was considered carefully by both parties, and each thought that " a term of years " in the Act could mean something less than two years. The authorities on the common law on this matter are extremely confusing; they decide that " a term of years " may mean less than two years; or one year plus something; or a fixed term such as six weeks.

[PEARCE L.J. The landlord wants to have it as " a term of " years " within the Act but not within its protection?]

Yes; though if the case were argued under the Landlord and Tenant Act, 1954, the landlord would be just as well off.

[*Anthony Cripps Q.C.* intervened to say that he had been precluded by what he had conceded before Diplock J. from arguing about " a term of years "; but if the court took the view that the agreement was not permissible it was his duty to ask for leave to amend the notice of appeal to claim the different security under the Act of 1954.]

Blundell Q.C. continuing. The protection given to licensees by the latter part of section 2 is irrelevant on the point at issue under subsection (1). If Parliament had intended to deal with fixed terms less than two years it would have included them in section 3. If a term of 18 months comes within section 2 it is being reduced—not enlarged—to a tenancy determinable at the end of its first year.

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[3] [1944] K.B. 657.

[4] [1955] 1 Q.B. 214, 217; [1954] 3 W.L.R. 810; [1954] 3 All E.R. 498, C.A.

The submission for the tenant based on section 23 is that the tenancy referred to in section 2 (1) must be one which lasts for at least two years, because section 23 says that notice to quit cannot be effective "if it purports to terminate the tenancy before the "expiration of 12 months from the end of the then current year of "tenancy." But nothing in section 23 says that notice cannot be given for a date earlier than two years from the commencement of the tenancy. It does not give a tenant any particular length of tenancy but merely ensures that he shall have a particular length of notice. The addition of a condition as to how a tenancy may be brought to an end does not alter the quality of the interest granted: see *Breams Property Investment Co. Ltd.* v. *Stroulger.*[5] A year-to-year tenancy remains the same even though it has a condition written into it by statute; and all that the Act of 1948 does by the restrictions on notice to quit is to add a condition to the interest known to the common law as a tenancy from year to year, which, as Diplock J. said, has certain invariable characteristics. Nothing in the Act gives the tenant a minimum of two years, though in practice it may usually operate in that way. An agricultural tenancy from year to year can, in certain circumstances, be terminated at the end of the first year.

The interpretation of section 2 (1) suggested for the tenant would require to be written into section 2 (1), after "for an "interest less than a tenancy from year to year," words such as "with the attributes of such a tenancy as operated in relation "to agricultural holdings." But nothing in subsection (1) requires the court to consider the special attributes of an agricultural tenancy; it deals with the plain yardstick of a common law tenancy from year to year and that which can be said to be less than that. The word used in section 2 is "interest," which directs attention to the quality of the estate granted. Section 23 does not alter or enlarge that interest but merely fetters the mode of termination of that common law interest. The proviso to section 23 supports that submission: the interest granted cannot depend on whether it is granted by a tenant to a sub-tenant, or on whether the grantee subsequently becomes bankrupt.

Cripps Q.C. in reply. The important phrase in section 2 (1) is

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[5] [1948] 2 K.B. 1; 64 T.L.R. 292; [1948] 1 All E.R. 758, C.A.

"for an interest less than a tenancy from year to year." The word "interest" includes something more than an estate in the land. It consists both in the technical estate and the attaching conditions of being able to insist on a notice to quit and therefore on the protection of the Act. If the interest of an agricultural tenant from year to year consists partly in his common law year-to-year tenancy and partly in the incidents thereof attached for many years before the Act of 1948 by the agricultural holdings legislation, then the interest of such a tenant from year to year is greater than that of a tenant with a term of 18 months certain. It would follow that an interest for 18 months is "less "than a tenancy from year to year" within subsection (1) of section 2, and is intended to be and is protected by the Act of 1948.

Cur. adv. vult.

SELLERS L.J. I will ask Pearce L.J. to give the first judgment.

PEARCE L.J. The defendant appeals against a judgment for possession and mesne profits given in the plaintiff's favour by Diplock J.

By an agreement in writing dated March 29, 1956, the plaintiff landlord let a farm to the defendant tenant for the term certain of 18 months from November 1, 1955, terminating on May 1, 1957. Both parties agree that this was a letting of an agricultural holding within the meaning of section 1 of the Agricultural Holdings Act, 1948.

To be within the Act a tenancy must by section 1 (1) be "a "contract of tenancy" which, by definition (section 94 (1)), means a letting of land or agreement for letting of land "for a "term of years or from year to year." Both parties are agreed for the purposes of the case that (although the matter is not wholly free from doubt) this letting, being in excess of one year, comes within the definition of "a term of years," and the judge dealt with the matter on that basis.

No notice to quit was given. This was not necessary at common law, since the tenancy would automatically terminate on May 1, 1957. The tenant, however, contends that the tenancy took effect as a tenancy from year to year by virtue of section 2 (1) of the Act, so that it continues until terminated by notice to quit, and the landlord has therefore no right to possession. And if the landlord in order to determine the tenancy is compelled to serve a notice to quit, the tenant will thereby be enabled to serve a counter-notice under section 24 and obtain the security of tenure and other benefits conferred on tenants under the Act. The broad issue in the case, therefore, is whether the tenancy is entitled to the protection and benefits of the Act.

The Act in general gives protection to tenants of agricultural holdings. If the judge is right in holding that section 2 (1) does not apply to this tenancy, there is a gap in that protection which he felt (as a guess) was probably due to an omission on the part of the legislature. The tenant argues there has been no such omission, that there is no gap in the general protection afforded to tenants, and that this tenancy is in fact protected.

The judge gave a concise and clear summary of the antecedents of the Act, but he concluded that they provided no material either to support the tenant's argument or to destroy it. The protection afforded to tenants by the Agricultural Holdings Act, 1923, was less valuable and less general in its application than that given by the Act of 1948.

Mr. Blundell, for the landlord, argues that the wide words of section 2 (1) of the Act of 1948 were not designed to give a general protection to tenancies for fixed terms of short duration but were merely directed to preventing evasion on the lines of *Land Settlement Association Ltd.* v. *Carr*,[1] in which a periodic letting from 364 days to 364 days successfully avoided the provisions of the Act of 1923. One must therefore, he argues, approach the section on the basis that any omission of protection is a deliberate maintenance of the pre-existing position and that any protection of short terms, except so far as necessary to stop such evasions, is fortuitous. That ingenious argument does not persuade me. Mr. Cripps, for the tenant, admits that he can found no argument on the provisions of the earlier Act, and I accept his submission that they provide no argument in the landlord's favour.

Section 2 (1) of the Act of 1948 provides that " . . . where . . . " land is let to a person for use as agricultural land for an " interest less than a tenancy from year to year, or a person is " granted a licence to occupy land for use as agricultural land, " and the circumstances are such that if his interest were a " tenancy from year to year he would in respect of that land be the " tenant of an agricultural holding, then, unless the letting or " grant was approved by the Minister before the agreement was

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[1] [1944] K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126, C.A.

"entered into, the agreement shall take effect, with the necessary "modifications, as if it were an agreement for the letting of the "land for a tenancy from year to year."

Section 3 (1) provides that "A tenancy of an agricultural "holding for a term of two years or upwards shall, instead of "terminating on the expiration of the term for which it was "granted, continue (as from the expiration of that term) as a "tenancy from year to year, . . ."

If the letting for a term of 18 months was not a "letting for "an interest less than a tenancy from year to year" under section 2 (1) it escapes from both sections; and the tenant does not enjoy the protection of the Act.

At common law a tenancy for 18 months clearly does not create an interest less than a tenancy from year to year, for the latter may be determined at the end of one year while the former continues for 18 months certain.

But it is argued for the tenant that a tenancy from year to year under the Act, unlike a tenancy from year to year at common law, is in fact equivalent to a tenancy for two years, since it cannot be determined until two years have expired; and the standard of comparison under section 2 (1) is a tenancy from year to year under the Act and not a common law tenancy from year to year. That being so, it is argued, the 18-months' tenancy creates an interest less than a tenancy under the Act and is therefore within the provisions of section 2 (1). The basis of this argument is section 23 (1), which provides to tenants from year to year inter alios additional protection in that (with certain exceptions contained in the proviso) "A notice to quit an agricultural "holding or part of an agricultural holding shall (notwithstanding any provision to the contrary in the contract of tenancy "of the holding) be invalid if it purports to terminate the tenancy "before the expiration of 12 months from the end of the then "current year of tenancy." Thus in practice a tenancy from year to year cannot normally be determined until two years after its commencement.

This argument would read the words "where . . . land is let "to a person for use as agricultural land for an interest less than "a tenancy from year to year" as meaning "where . . . land "is let to a person for use as agricultural land for an interest less "than a tenancy from year to year, as enlarged by the Agricultural Holdings Act so as to be equivalent to a tenancy of two "years." Tenancies less than two years would thus be protected under section 2 (1) and tenancies for two years and upwards would be protected under section 3 (1). So one would get universal and logical protection instead of a capricious protection that omits to cover tenancies for more than one year and less than two. The power of the Minister to give his approval to some tenancies, and allow them to escape the effects of section 2 (1) is used in argument as a confirmation of the view that section 2 (1) is meant to cover every tenancy that is not covered by section 3 (1). Moreover, it is said that, by so reading the section, one achieves a comparison of like with like, a comparison of one tenancy under the Act with another tenancy under the Act. There is clearly much attraction and force in such an argument.

It is further contended that comparison with a common law tenancy from year to year cannot have been intended by section 2 (1) because in that case it would have been so simple to say "less than a year" instead of the more cumbersome "less than "a tenancy from year to year." But that argument applies a fortiori against Mr. Cripps' own contention. It would have been far simpler to say "less than two years" with their cryptic implication of the rider "as enlarged by the Agricultural Holdings "Act so as to be equivalent to a tenancy of two years." Moreover this would have been far more apt in juxtaposition with section 3 (1), which simply speaks of tenancies for a term of two years or upwards.

The landlord's argument, which the judge accepted, was this: Whereas a common law tenancy from year to year had certain and invariable characteristics which made it a reasonable yardstick, the tenancy from year to year of an agricultural holding under the Act had no such invariable characteristics, and could not have been intended as a yardstick.

In deciding whether land is let for an interest less than a tenancy from year to year one clearly takes for comparison the minimum period of a tenancy from year to year. The minimum period of such a tenancy at common law is one year, for the tenancy can be determined by notice taking effect at the end of the first year. The interest of such a tenancy has been clearly established and its characteristics have been defined by law. Although it is not a convenient yardstick against which to measure a letting for a fixed term, it has the advantage of certainty in its attributes. But the special year to year tenancy under the Act for which Mr. Cripps contends has no such certainty; nor is it a definite or definable interest. It is a common law tenancy from

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year to year which the landlord may according to the circumstances be unable to terminate by notice to quit before the expiry of two years.

There is nothing in the Act to alter the tenant's interest where he is a tenant from year to year under it. Under section 23 (1) there is merely a fetter on the landlord's right to give a valid notice to quit in all cases except those specified in the proviso. Nor does that section purport to deal with year to year tenancies in particular. It deals generally with every kind of tenancy. Admittedly that fetter will apply in the majority of cases of year to year tenancies, and therefore, Mr. Cripps argues, the cases where the fetter applies should be regarded as the normal Agricultural Holdings Act tenancy. But the exceptions under the proviso are not unsubstantial. The fetter does not apply (a) where the tenant becomes bankrupt, or (b) where a provision in the contract allows resumption of possession for some specified purpose other than the use of the land for agriculture, or (c) where a subtenancy is being determined, or (d) in certain transitional cases where the contract of tenancy preceded the Act, or (e) where section 149 of the Law of Property Act, 1925, applies. This temporary fetter on the giving of certain notices to quit does not alter the nature of the tenant's interest: see *Breams Property Investment Co. Ltd.* v. *Stroulger.*[2]

Therefore, in spite of Mr. Cripps' able argument, I can see no justification for construing the words of section 2 (1) in any other than their normal sense. The words "a tenancy from year to "year" must be taken to mean the tenancy that is known to the common law under that name. They cannot be read as meaning some other interest not known to the law, whose identity can only be derived from the average effect of a temporary fetter imposed in most (but by no means all) cases on the giving of notice to quit.

I arrive at this conclusion with reluctance, but it seems to me inevitable. If the gap in the protection given by the Act was accidental and leads to the evasions which Mr. Cripps envisages, it is for Parliament to remedy the matter. I wholly agree with the judge's lucid judgment and would dismiss the appeal.

DEVLIN L.J. In my judgment Diplock J. has given to this Act the only meaning which it can possibly bear. I cannot hope to equal the clarity and economy of his reasoning, and I propose therefore to adopt exactly what he says as expressing my judgment on the true construction of the Act.[3]

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[2] [1948] 2 K.B. 1; 64 T.L.R. 292; [1948] 1 All E.R. 758, C.A.

I may add that I am, of course, concerned about the fact that the Act as interpreted in this way applies to tenancies over two years or under one year but not to those between one and two years. I can see no sense in this distinction and cannot believe it to be intended. Mr. Blundell has shown us by reference to previous legislation how the gap has been created. It never occurred to the legislature that anybody would want an agricultural tenancy for any period that was not measured by the year, and indeed nobody would want one except for the purpose of defeating the objects of the enactment which the legislators were engaged in making. Accordingly Parliament must have thought that when it provided first for tenancies from year to year, that is, at least one year, and secondly for tenancies of two years and upwards that could be terminated only by notice to quit, it had covered the ground.

In 1944 the Court of Appeal held in *Land Settlement Association Ltd.* v. *Carr*[4] that a tenancy for 364 days—that is, less than one year—was not covered. Section 2 (1) of the Agricultural Holdings Act, 1948, which we have to construe, was doubtless aimed at the decision in *Carr's* case,[4] and as a result of it tenancies under one year can now be terminated only by a notice to quit. Mr. Blundell argues that Parliament could not have overlooked the existence of what I have called the gap, the period between one and two years, and must have intended to preserve it so as to provide for a carry-over lease, that is, a short lease which, as in the present case, was intended to cover the period while the proposed incumbent was still a minor. I cannot accept that. The carry-over lease might be any period from a few months to a few years, and, as Mr. Cripps suggested, Parliament probably intended that exceptional cases of this sort should be covered by the provisions in the section which enable the Minister, if he so desires, to relax the rule, provided that the lease or grant is submitted to him before the agreement is entered into.

I think, therefore, that this is simply a casus omissus and that the Act is defective. If it were ever permissible for the court to repair a defective Act of Parliament I should be very glad to do so in this case. The court would always like to allow the intention of a statute to override the defects in its wording, but its ability

[3] [1960] 1 Q.B. 170, 176–178; [1959] 3 W.L.R. 815; [1959] 3 All E.R. 475.

[4] [1944] K.B. 657, C.A.

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to do so is limited by the recognised canons of interpretation. The court may, for example, prefer an alternative construction which is less well fitted to the words but better fitted to the intention of the Act. But here, for the reasons given by the judge, there is no alternative construction. It is simply a case of something being overlooked. We cannot legislate for a casus omissus. I may be sure in this case that I know exactly what Parliament would do if it perceived the gap. But if the rule were to be relaxed, sooner or later the court would be saying what Parliament meant and would get it wrong and thus usurp the law-making function. It is a matter of keeping within the recognised canons, and they do not permit the court to supply words if the *only* (and I emphasise only) ground for their admission is to give legislative efficacy to a statute. For these reasons I agree that the appeal should be dismissed.

Sellers L.J. The submission for the tenant is certainly attractive, having the advantage, if it is correct, of creating uniformity and overcoming what may otherwise be an unintentional omission in regard to the security of tenure in agricultural holdings; but I have reached the same conclusion as my lords. I agree with what they have said and with the clearly expressed and carefully reasoned judgment under appeal and I cannot usefully add to the reasoning they embody. I would dismiss the appeal.

Appeal dismissed with costs.
Leave of appeal to the House of Lords granted.

Solicitors: *Ellis & Fairbairn; Theodore Goddard & Co. for Llewellyn-Jones and Armon Ellis, Rhyl.*

M. M. H.

C. C. A.
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June 20; *July* 4.
Lord Parker C.J., Hilbery and Diplock JJ.

REGINA *v.* BYRNE.

Crime — Homicide — Diminished responsibility — Sexual pervert — "Abnormality of mind"—Standard of proof—Control of physical acts—Inability or difficulty—Relevance of medical evidence—Matters for jury's consideration—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2 (1).

The appellant was charged with the murder of a young girl whom he had strangled and whose dead body he had mutilated. He admitted the facts of the killing and pleaded that he was suffering from diminished responsibility as defined by section 2 of the Homicide Act, 1957,[1] and was, accordingly, not guilty of murder but of manslaughter.

The judge directed the jury to the effect that if the appellant killed the girl under an abnormal sexual impulse or urge which was so strong that he found it difficult or impossible to resist it, but that he was otherwise normal, the section would not apply. He was found guilty of murder and appealed on the ground of a misdirection:—

Held, (1) that "abnormality of mind" in section 2 meant a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal and was wide enough to cover the mind's activities in all its aspects, including the ability to form a rational judgment as to whether an act was right or wrong, and the ability to exercise will power to control physical acts in accordance with that rational judgment.

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(2) That inability to exercise will power to control physical acts, provided that it was due to abnormality of mind from one of the causes specified in section 2 (1), was sufficient to entitle the accused to the benefit of the section; difficulty in controlling his physical acts depending on the degree of difficulty, might be; it was for the jury to decide on the whole of the evidence whether such inability or difficulty had, not as a matter of scientific certainty but on the balance of probabilities, been established, and in the case of difficulty whether that was so great as to amount in their view to a substantial impairment of the accused's mental responsibility for his acts.

(3) That whether the accused was suffering from abnormality of mind and whether the abnormality was such as substantially impaired his mental responsibility were matters for the jury on which they were entitled to disagree with the medical evidence, but the aetiology of the abnormality was a matter to be determined by expert evidence; that the direction withdrew from the jury the essential determination of fact which it was their province to decide; the medical evidence and the other evidence plainly pointed to the conclusion that the appellant was on the border-line of insanity, and properly directed, the jury could not have come to any conclusion but that the defence under section 2 (1) was made out.

APPEAL against conviction.

The appellant, Patrick Joseph Byrne, was charged with the murder of a young woman who was strangled in a Y.W.C.A. hostel in Birmingham. Mutilations were committed on the girl's dead body. The appellant admitted the facts of the killing and the only defence was that he was suffering from diminished responsibility as defined by section 2 of the Homicide Act, 1957, and was, accordingly, guilty not of murder but of manslaughter. The appellant was convicted of murder before Stable J. at Birmingham Assizes and sentenced to imprisonment for life. He appealed on the ground of misdirection by the judge.

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[1] Homicide Act, 1957, s. 2 (1): "Where a person kills or is a party "to the killing of another, he shall "not be convicted of murder if he "was suffering from such abnormality of mind (whether arising from "a condition of arrested or retarded "development of mind or any inherent causes or induced by disease "or injury) as substantially impaired "his mental responsibility for his "acts and omissions in doing or being a party to the killing."

The relevant facts are set out in the judgment of the court.

R. K. Brown Q.C. and *John Owen* for the appellant. The defence raised under section 2 of the Homicide Act, 1957, is a statutory defence and, as such, the judge has to look at the words of the statute and must not attempt to redefine it. He may assist a jury by giving illustrations: *Reg.* v. *Walden* [2]; *Bank of England* v. *Vagliano Bros.*[3] It is difficult to draw the line between illustration and definition, but in the present case the judge [4] clearly redefined the section by limiting its application.

A sexual psychopath, given certain circumstances, is likely to act in a certain way because he cannot control himself. Expert medical evidence can only show that the accused is an abnormal person and unlikely to be able to control himself. It is for the jury to decide whether the accused wilfully refused to control himself or whether he could not help himself. The distinction between the ability to control acts and power to distinguish between right and wrong is unnecessary. The latter is an allusion to the M'Naughten Rules. Power to control oneself is quite different: see *Reg.* v. *Spriggs* [5] with reference to uncontrollable impulse.

With regard to the wording of section 2 (1), "substantial" means something considerable; one has to consider whether the accused's mind was materially affected at the time of the offence. It is partly a question of right and wrong and partly of moral responsibility. It may be that a man is so far out of his mind that he does not know what he is doing. Although that was negatived in the present case, the judge might have said that in certain circumstances a person with the accused's abnormality might not have known what he was doing. "Substantial impairment of mental responsibility" may mean that although a person knows that what he is doing is wrong, his abnormality is such as to prevent him from controlling his impulse. The passage in the summing-up [6] of which complaint is made errs not only by putting matters of definition and exclusion, but also because the judge there decided a question of fact which should have been left to the jury. The judge should have left the jury to decide whether a sexual pervert came within the section. The general effect of the summing-up on the jury must have been: "If you think the appellant is "nothing but a sexual pervert, then you need not consider "section 2." It was an invitation to the jury to take an emotional view, which should have been guarded against, particularly in view of the facts of the case. The facts and evidence surrounding the killing might have been of more assistance to the jury than any medical evidence. The facts themselves clearly showed insane thoughts on the part of the accused. The present case is not to be distinguished from *Reg.* v. *Matheson*,[7] in which basically the same situation arose: "Substantial impairment of "mental responsibility" might mean partial insanity, but it was not put in that way, and the issue of partial insanity was not put to the jury.

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[2] [1959] 1 W.L.R. 1008; [1959] 3 All E.R. 203, C.C.A.

[3] [1891] A.C. 107; 7 T.L.R. 333, H.L.

[4] Post, p. 401.

[5] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300, C.C.A.

John Hobson Q.C. and *Elizabeth Lane Q.C.* for the Crown. If there is evidence on which a jury could convict and no misdirection by the judge, then this court will not interfere with the verdict: *Reg.* v. *Matheson*.[8] There were matters before the jury which would have enabled them to differ from the opinion expressed by the medical witnesses had they so wished. The medical witnesses may have been right in saying that the appellant was a sexual psychopath and was suffering from an abnormality of mind within the section; but they did not say that this abnormality affected his mental responsibility. The question of mental responsibility ought to be viewed in the light of the M'Naughten Rules, whereby a person who knows what he is doing, and knows that what he is doing is wrong, is fully responsible. A person's responsibility in this sense may be impaired by reason of the causes specified in section 2. An alternative way of putting the matter is to consider it as it was argued in *Reg.* v. *Spriggs*.[9] Mental responsibility implies will, intellect, power, judgment—all those aspects of the higher functions of the mind, including conscience. A jury has to consider whether a man is in such a condition as to control his acts by the higher judgment of his mind. If that is the correct approach, then the medical evidence must show that the abnormality of mind was such as to affect the person's control of his will and judgment, and that his control had been substantially impaired. It is for the jury to say whether a man had an abnormality of mind and, if so, whether it affected his mental responsibility. None of the medical witnesses in the present case addressed his mind to the second point. They did not consider how much the accused's mental responsibility was impaired by reason of his abnormality, but only whether or not he had an abnormality of mind.

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[6] Post, p. 401.

[7] [1958] 1 W.L.R. 474; [1958] 2 All E.R. 87, C.C.A.

[8] Ibid.

[9] [1958] 1 Q.B. 270.

The judge in the words criticised did not postulate any unusual lack of control or loss of responsibility. If a man has exceptionally strong sexual desires and in satisfying them kills a girl, he does not come within the provisions of section 2. Judges in Scotland have held that shortness of temper and lack of self-control do not entitle a man to a verdict of manslaughter under the Scottish rule of diminished responsibility.

It was said in *Walden's* case [10] that the judges were only entitled to give illustrations. They have, however, always given extensive assistance to juries in construing Acts of Parliament, e.g., in road traffic cases. Judges should always be allowed to assist juries in considering the interpretation of statutes, and to that extent *Spriggs* [11] is wrongly decided.

Cur. adv. vult.

July 4. LORD PARKER C.J. The appellant was convicted of murder before Stable J. at Birmingham Assizes and sentenced to imprisonment for life. The victim was a young woman whom he strangled in the Y.W.C.A. hostel, and after her death he committed horrifying mutilations upon her dead body. The facts as to the killing were not disputed, and were admitted in a long statement made by the accused. The only defence was that in killing his victim the accused was suffering from diminished responsibility as defined by section 2 of the Homicide Act, 1957, and was, accordingly, guilty not of murder but of manslaughter.

Three medical witnesses were called by the defence, the senior medical officer at Birmingham Prison and two specialists in psychological medicine. Their uncontradicted evidence was that the accused was a sexual psychopath, that he suffered from abnormality of mind, as indeed was abundantly clear from the other evidence in the case, and that such abnormality of mind arose from a condition of arrested or retarded development of mind or inherent causes. The nature of the abnormality of mind of a sexual psychopath, according to the medical evidence, is that he suffers from violent perverted sexual desires which he finds it difficult or impossible to control. Save when under the influence of his perverted sexual desires he may be normal. All three doctors were of opinion that the killing was done under the influence of his perverted sexual desires, and although all three were of opinion that he was not insane in the technical sense of insanity laid down in the M'Naughten Rules it was their view that his sexual psychopathy could properly be described as partial insanity.

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[10] [1959] 1 W.L.R. 1008.

[11] [1958] 1 Q.B. 270.

In his summing-up the judge, after summarising the medical evidence, gave to the jury a direction of law on the correctness of which this appeal turns. He told the jury that if on the evidence they came to the conclusion that the facts could be fairly summarised as follows:

"(1) From an early age he has been subject to these perverted violent desires, and in some cases has indulged his desires; (2) the impulse or urge of these desires is stronger than the normal impulse or urge of sex to such an extent that the subject finds it very difficult or perhaps impossible in some cases to resist putting the desire into practice; (3) the act of killing this girl was done under such an impulse or urge; and, (4) that setting aside these sexual addictions and practices, this man was normal in every other respect"; those facts with nothing more would not bring a case within the section, and do not constitute such abnormality of mind as substantially to impair a man's mental responsibility for his acts. "In other words," he went on, "mental affliction is one thing. The section is there to protect them. The section is not there to give protection where there is nothing else than what is vicious and depraved."

Taken by themselves these last words are unobjectionable, but it is contended on behalf of the appellant that the direction taken as a whole involves a misconstruction of the section, and had the effect of withdrawing from the jury an issue of fact which it was peculiarly their province to decide.

Section 2 of the Homicide Act, 1957, is dealing with the crime of murder in which there are at common law two essential elements: (1) The physical act of killing another person, and (2) the state of mind of the person who kills or is a party to the killing, namely, his intention to kill or to cause grievous bodily harm. Subsection (1) of section 2 does not deal with the first element. It modified the existing law as respects the second element, that is, the state of mind of the person who kills or is a party to the killing.

Before the passing of the Homicide Act, 1957, a person who killed or was party to a killing could escape liability for murder—as for any other crime requiring mens rea—if he showed that at the time of the killing he was insane within the meaning of the M'Naughten Rules, that is, "that he was labouring under such a "defect of reason from disease of the mind as not to know the "nature and quality of the act that he was doing, or if he did "know it that he did not know that he was doing wrong." If established, this defence negatives mens rea and the accused was and still is entitled to a special verdict of "guilty of the act but "insane" at the time of doing the act, which is an acquittal of any crime. The test is a rigid one: it relates solely to a person's intellectual ability to appreciate: (a) the physical act that he is doing, and (b) whether it is wrong. If he has such intellectual ability, his power to control his physical acts by exercise of his will is irrelevant.

The ability of the accused to control his physical acts by exercise of his will was relevant before the passing of the Homicide Act, 1957, in one case only: that of provocation. Loss of self-control on the part of the accused so as to make him for the moment not master of his mind had the effect of reducing murder to manslaughter if: (i) it was induced by an act or series of acts done by the deceased to the accused, and (ii) such act or series of acts would have induced a reasonable man to lose his self-control and act in the same manner as the accused acted. (See *Rex* v. *Duffy*.[1])

Whether loss of self-control induced by provocation negatived the ordinary presumption that a man intends the natural ordinary consequences of his physical acts so that, in such a case, the prosecution had failed to prove the essential mental element in murder (namely, that the accused intended to kill or to inflict grievous bodily harm) is academic for the purposes of our consideration. What is relevant is that loss of self-control has always been recognised as capable of reducing murder to manslaughter, but that the criterion has always been the degree of self-control which would be exercised by a reasonable man, that is to say, a man with a normal mind.

It is against that background of the existing law that section 2

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[1] [1949] 1 All E.R. 932n., C.C.A.

(1) of the Homicide Act, 1957, falls to be construed. To satisfy the requirements of the subsection the accused must show: (a) that he was suffering from an abnormality of mind, and (b) that such abnormality of mind (i) arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury and (ii) was such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing.

"Abnormality of mind," which has to be contrasted with the time-honoured expression in the M'Naughten Rules "defect of "reason," means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression "mental "responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts.

Whether the accused was at the time of the killing suffering from any "abnormality of mind" in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is no doubt of importance, but the jury are entitled to take into consideration all the evidence, including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it.

The aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence.

Assuming that the jury are satisfied on the balance of probabilities that the accused was suffering from "abnormality of "mind" from one of the causes specified in the parenthesis of the subsection, the crucial question nevertheless arises: was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant, but the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called "substantial," a matter upon which juries may quite legitimately differ from doctors.

Furthermore, in a case where the abnormality of mind is one which affects the accused's self-control the step between "he did "not resist his impulse" and "he could not resist his impulse" is, as the evidence in this case shows, one which is incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses. These problems which in the present state of medical knowledge are scientifically insoluble, the jury can only approach in a broad, common-sense way. This court has repeatedly approved directions to the jury which have followed directions given in Scots cases where the doctrine of diminished responsibility forms part of the common law. We need not repeat them. They are quoted in *Reg.* v. *Spriggs*.[2] They indicate that such abnormality as "substantially impairs his mental "responsibility" involves a mental state which in popular language (not that of the M'Naughten Rules) a jury would regard as amounting to partial insanity or being on the border-line of insanity.

It appears to us that the judge's direction to the jury that the defence under section 2 of the Act was not available even though they found the facts set out in Nos. 2 and 3 of the judge's summary, amounted to a direction that difficulty or even inability of an accused person to exercise will power to control his physical acts could not amount to such abnormality of mind as substantially impairs his mental responsibility. For the reasons which we have already expressed we think that this construction of the Act is wrong. Inability to exercise will power to control physical acts, provided that it is due to abnormality of mind from one of the causes specified in the parenthesis in the subsection is, in our view, sufficient to entitle the accused to the benefit of the section; difficulty in controlling his physical acts depending on the degree of difficulty, may be. It is for the jury to decide on the whole of the evidence whether such inability or difficulty has, not as a matter of scientific certainty but on the balance of probabilities, been established, and in the case of difficulty whether the difficulty is so great as to amount in their view to a substantial impairment of the accused's mental responsibility for his acts. The direction in the present case thus withdrew from the jury the essential determination of fact which it was their province to decide.

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[2] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300.

As already indicated, the medical evidence as to the appellant's ability to control his physical acts at the time of the killing was all one way. The evidence of the revolting circumstances of the killing and the subsequent mutilations as of the previous sexual history of the appellant pointed, we think plainly, to the conclusion that the accused was what would be described in ordinary language as on the border-line of insanity or partially insane. Properly directed, we do not think that the jury could have come to any other conclusion than that the defence under section 2 of the Homicide Act was made out.

The appeal will be allowed and a verdict of manslaughter substituted for the verdict of murder. The only possible sentence having regard to the tendencies of the accused is imprisonment for life. The sentence will, accordingly, not be disturbed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

C. J. E.

DINGLE *v.* ASSOCIATED NEWSPAPERS LTD. AND OTHERS.

[1958 D. No. 1084.]

1959
Dec. 2, 3, 4, 7, 8, 9, 10.

Pearson J.

Parliament—Privilege—Right to control own proceedings—Report of select committee of House of Commons—Attack on validity of report—Whether comment on report permissible—Bill of Rights, 1688 (1 *Will. & Mary, sess.* 2, *c.* 2), *s.* 1, *art.* 9.

Libel—Privilege—Qualified privilege—Parliamentary papers—Report of select committee of House of Commons—Comment at the trial on proceedings and report of committee—Whether comment relevant—Parliamentary Papers Act, 1840 (3 *&* 4 *Vict. c.* 9), *s.* 3.

To impugn the validity of the report of a select committee of the House of Commons, especially one which has been accepted as such

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

by the House by being printed in the House of Commons Journal, is contrary to section 1, article 9 of the Bill of Rights, 1688.[1] No such attempts can properly be made outside Parliament.

Bradlaugh v. *Gossett* (1884) 12 Q.B.D. 271 applied.

Where defendants bona fide and without malice published an extract from a report of a select committee of the House of Commons defamatory of the plaintiff, who sued them for libel:—

Held, that they were entitled to the statutory defence under section 3 of the Parliamentary Papers Act, 1840,[2] and it was not relevant at the trial for the plaintiff to comment on the report or on the proceedings leading to the publication of the report.

ACTION.

The plaintiff, Philip Burrington Dingle, the town clerk of Manchester, sued for damages for libels appearing in the issues of the *Daily Mail* newspaper for June 16 and June 26, 1958. The first defendants, Associated Newspapers Ltd., were the proprietors of the *Daily Mail;* Arthur George Wareham, the second defendant, was the editor of the *Daily Mail*, and Michael Kelly, the third defendant, was a journalist employed by the first defendants. The plaintiff alleged that in the issue of the *Daily Mail* for June 16, 1958, the defendants falsely and maliciously printed and published an article concerning the circumstances in which the shares in Ardwick Cemetery Ltd. were acquired by the Manchester Corporation. The article, which stated that it was written by the third defendant, purported to be the report of an interview with the chairman of Ardwick Cemetery Ltd., and set out allegations by the chairman that while negotiations for the sale of shares in Ardwick Cemetery Ltd. were in progress between its board of directors and the Manchester Corporation, the plaintiff went behind the backs of the board and sent out a letter to the shareholders offering them £1 for each share, a price which was less than the offer for which the board were then negotiating; and that the shares in Ardwick Cemetery Ltd. were worth more than double the £1 each that, as a result of the plaintiff's letter to the shareholders, the corporation paid for them. The article then contained the following paragraph:

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[1] Bill of Rights, 1688, s. 1, art. 9: "That the freedom of speech and "debates or proceedings in Parliament "ought not to be impeached or questioned in any court or place out of "Parliament."

[2] Parliamentary Papers Act, 1840, s. 3: "It shall be lawful in any civil "or criminal proceeding to be commenced or prosecuted for printing "any extract from or abstract of such "report, paper, votes, or proceedings, "to give in evidence under the "general issue such report, paper, "votes, or proceedings, and to show "that such extract or abstract was "published bona fide and without "malice; and if such shall be the "opinion of the jury a verdict of not "guilty shall be entered for the defendant or defendants."

"Objections

"Twice there have been formal objections in the House of "Commons to a bill dealing with the cemetery. A debate has "been arranged for Thursday, but this may be shelved. Sir John "Barlow, M.P. for Middleton and Prestwich, has put down a "motion that there should be an independent valuation of the "shares. If it proved more than £1 the balance would be paid "by the corporation for all shares bought after December 2 last. "If not, the original £1 deal would stand. Last month, a committee of the House of Commons, examining the Bill—it was "intended to enable Manchester to take over the cemetery for "conversion to playing fields or an open space—reported—'It "'was clear to the committee that the corporation obtained the "'shares by presenting a one-sided view, which failed to disclose "'the true position of the company on a break-up.'" The article ended with a report of the views of the chairman of Ardwick Cemetery Ltd. on the acquisition of the company by Manchester Corporation. The plaintiff alleged that the whole of this article meant, and was understood to mean, that he had by a statement which he knew to be misleading, false or deceptive, or by dishonest concealment of material facts, induced the shareholders of Ardwick Cemetery Ltd. to enter into or offer to enter into an agreement to sell their shares, and that the plaintiff was guilty of an offence under section 12 (1) of the Prevention of Fraud (Investments) Act, 1939.

The defendants pleaded various defences, and in relation to the paragraph in the article headed "Objections," which is set out above, they contended, inter alia, that in so far as the words in that paragraph consisted of statements of fact, they were a fair and accurate report of parliamentary proceedings published by the defendants bona fide and without malice. The defendants further contended in relation to this paragraph that the words "it was clear to the committee that the corporation obtained the "shares by presenting a one-sided view, which failed to disclose "the true position of the company on a break-up" were extracted from the report of a select committee of the House of Commons, and were an extract from a parliamentary paper within the meaning of the Parliamentary Papers Act, 1840, namely, from the report of the select committee on the Manchester Corporation Bill, and were published bona fide and without malice. This

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report was laid on the table of the House of Commons and made public; and by a standing order the committee were required to report to the House any circumstances relating to the Bill of which they thought the House should be informed.

In his reply, the plaintiff denied, inter alia, that publication of the extract from the report of the select committee was privileged, and contended that the extract was not a report of parliamentary proceedings but was an extract of what purported to be a report from the committee.

In the course of the trial certain questions arose on matters of parliamentary privilege in respect of the proceedings and report of the select committee, and on the defence raised under the Parliamentary Papers Act, 1840. It was indicated, or appeared to be indicated, in the opening speech for the plaintiff, that an attack was to be made on the report of the select committee, and that the attack was, perhaps, to be carried to the extent of impugning the validity of the report on the ground of some defect of procedure.

Questions also arose on the effect of the publication of extracts from the report of the select committee on the assessment of damages. The case is reported solely on the question of parliamentary privilege and on these matters.

Geoffrey Lawrence Q.C. and *W. D. T. Hodgson* for the plaintiff.

Neville Faulks Q.C. and *David Hirst* for the defendants.

Sir Jocelyn Simon Q.C., S.-G., J. R. Cumming-Bruce and *R. A. Barr* as amici curiae. In this case matters have arisen which might affect the relationship between the law courts and Parliament. It is well known that in the past there have been dangerous strains. There was a time when the courts used to commit the servants of the House of Commons and the House used to commit the tipstaff. But that state of affairs has happily passed almost into oblivion, and for many years both Parliament and the courts have been astute to respect the privileges of the other. The courts have been careful to exclude evidence which might amount to an infringement of parliamentary privilege. In this case the privilege of the House to regulate and to be the sole judge of the lawfulness of its own proceedings is involved.

It is understood that Mr. Lawrence proposed to attack the validity of the select committee's report on the ground that the procedure of the committee was defective. That falls within the scope of section 1, article 9, of the Bill of Rights, which provides that "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Moreover, article 9 is only declaratory of the law of Parliament; it may well be that the law is wider than article 9. See Erskine May's Parliamentary Practice, 16th ed., pp. 59–60. Each House has the right to judge its own proceedings: see *Bradlaugh* v. *Gossett*.[3] To attack the validity of the report on the ground that the procedure of the committee was defective would clearly fall within article 9 and *Bradlaugh's* case.[3] To lead independent evidence of the same matters canvassed before the committee would not be an infringement of parliamentary privilege, but it would be improper to impugn the honesty of the members of the committee.

Geoffrey Lawrence Q.C. It was never the intention to impugn the honesty of any member of the committee. The situation is a little peculiar. Complaint is made of the publication of a verbatim report of a statement of plain fact. The defendants admit that that statement is wrong. The plaintiff seeks to establish the true facts. It is conceded that it is not open to him to question the validity of the report of the select committee on the ground that its procedure was defective.

PEARSON J., after stating the matters set out above, continued: There is one other introductory matter which I think it is convenient to mention here before coming to the facts, and that is the subject of parliamentary privilege as it affected this action. In the opening speech something was said which indicated, or seemed to indicate, that there was going to be an attack on the report of the select committee of the House of Commons, and that the attack was, perhaps, to be carried to the extent of impugning the validity of the report, on the ground of some defect of procedure. In consequence of that, the Solicitor-General and Mr. Cumming-Bruce attended in this court on the second day of the trial as amici curiae and pointed out the difficulties arising in the sphere of parliamentary privilege.

Reference was made to the Bill of Rights, 1688, s. 1, art. 9, on freedom of speech, which provides: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

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[3] (1884) 12 Q.B.D. 271.

Reference was also made to *Bradlaugh* v. *Gossett*,[1] and it is sufficient to read a short portion of the headnote: "The House of "Commons is not subject to the control of Her Majesty's Courts "in its administration of that part of the statute law which has "relation to its internal procedure only. What is said or done "within its walls cannot be inquired into in a court of law. A "resolution of the House of Commons cannot change the law of "the land. But a court of law has no right to inquire into the "propriety of a resolution of the House restraining a member "from doing within the walls of the House itself something which "by the general law of the land he had a right to do." There is a clear affirmation of the exclusive right of Parliament to regulate its own internal proceedings.

That was one of the points put forward and, in my view, it is quite clear that to impugn the validity of the report of a select committee of the House of Commons, especially one which has been accepted as such by the House of Commons by being printed in the House of Commons Journal, would be contrary to section 1 of the Bill of Rights. No such attempts can properly be made outside Parliament.

The next point was that the Solicitor-General and Mr. Cumming-Bruce made a submission or a request that no comment on the report should be permitted in the course of the trial. That, as a matter of construction of the relevant provision in the Bill of Rights might have raised a more debatable question, but it seemed quite clear at the time, and still is clear, to my mind, that it was easy to give effect to that request because, once the question of the validity of the report had been excluded as outside the scope of the court's inquiries, any comment on the report, or how it was obtained, and the proceedings leading up to it, would have little or no materiality: indeed, to a large extent, any such comment would not be relevant at all.

Accordingly, for two reasons, because of the desire which the courts have to co-operate as far as possible with the parliamentary authorities in matters where there may be some debatable ground on which a conflict might arise, and because of the lack of materiality or even of relevancy, any comment has, throughout the proceedings, been ruled out.

I had better explain briefly why I say that any comment of that kind is of no materiality, and possibly of no relevancy, to the issues in the action. As to the basic facts of the case, clearly, in my view, this court should make its own findings based on the evidence adduced and on the arguments presented in this court, and that should be done without regard to any decisions reached or opinions expressed or findings made by a different tribunal having a different function, and, probably, different issues before it, and having received different evidence and a different presentation of the case.

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[1] (1884) 12 Q.B.D. 271.

Then, secondly, in so far as there is an issue under the Parliamentary Papers Act, 1840, s. 3, the fact that a report of the select committee was made is simply an event which happened, and it is not relevant to inquire how it came to be made or what led up to it, and, if the defendants can show that they printed and published extracts from that report, and did so in good faith and without malice, they are entitled to the statutory defence, and no amount of comment on the report or on the proceedings leading up to it would deprive them of that defence or make it any worse or any better.

Finally, on the issue as to the assessment of damages, here again the report of the select committee is an event which happened, and, in so far as the making of the report and the printing of extracts from it in various newspapers caused damage to the plaintiff's reputation, the defendants are not responsible for that damage and, again, any amount of comment would have very little, if any, materiality and perhaps not even relevancy.

So on those two main points no difficulty arises at all. There were other matters, and also minor details of evidence, and I should mention that the Solicitor-General and Mr. Cumming-Bruce supplied further information and explanations with regard to the production of certain documents and other matters of evidence in which parliamentary privilege might be involved, but those are points of detail.[2] I would say only this, that manifestly

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[2] The Solicitor-General, referring to the question of parliamentary privilege, said that there were two species of evidence in question—the minutes of proceedings of the select committee, which were laid on the table of the House and were not published, and what were officially called the minutes of evidence. A request for the production of the minutes of proceedings had been made to the Speaker of the House of Commons on behalf of the plaintiff in the action, but the Speaker had refused it on the ground that the proper course was for the plaintiff to proceed by petition to the House for production of the minutes. No such petition had been made; and any evidence relating to these minutes of proceedings would, in his submission, clearly be a breach of parliamentary privilege.

The minutes of evidence were taken down and transcribed by an official shorthand writer, who was an officer of the House, and by a standing resolution he could not be called to produce the transcript or give evidence without leave; in this case leave had not been requested. Any the parliamentary authorities have given the fullest co-operation to facilitate the administration of justice without detriment to parliamentary privilege. This court is indebted to the Solicitor-General and to Mr. Cumming-Bruce for their intervention as amici curiae, and for the friendly help which they afforded in that capacity.

[The remainder of the case does not call for report. There were findings that the defendants had acted in good faith and without malice, so that the publication of the extracts from the select committee's report was privileged, and that the offer made by the plaintiff on behalf of the Manchester Corporation to buy the shares of the Ardwick Cemetery Ltd. for £1 each was a suitably generous offer, as the shares were worth considerably less than £1 each.]

Judgment for the plaintiff for £1,100.

Solicitors: *Stephenson, Harwood & Tatham for Grundy, Kershaw, Farrar & Co., Manchester; Swepstone, Walsh & Son; Treasury Solicitor.*

member of the public, however, could buy a copy of the transcript; so that if the minutes of evidence could be proved aliunde, for example by being an agreed document as in this case, it was unlikely that the House would treat its production as a breach of privilege.

It was important to remember that the House had never formally waived its privilege to prevent publication of its proceedings. There was, however, little doubt that if a petition had been made for the production of the minutes of evidence, as it had been for the copies of official reports of debates, it would have been granted. It therefore seemed that the court could safely consider a transcript of the evidence without any practical risk of collision with the House; but, in his submission, the proper procedure in future cases would be to present a petition. Reports by government departments to the select committee fell into the same class as the minutes of evidence, and all that he had already said applied to them also.

His Lordship asked whether the position still was that it would not be right to comment upon the conduct of the select committee.

The Solicitor-General said that if any comments were made or its validity impugned or any reflection made on its conduct, that would be very much in the danger area. The plaintiff's proposal to call evidence which was the same as that given before the select committee would not, however, be a breach of privilege.

WALLS *v.* PEAK (VALUATION OFFICER).

C. A.

[LVC/872/1958.]

1960
March 25.

Lord Evershed M.R., Pearce and Harman L.JJ.

Rating—" Dwelling-house "—Meaning—Rooms let singly for residential purposes—Whether used for purposes of private dwelling or private dwellings—Whether " substantially . . . whole of the available " accommodation . . . used for . . . lettings "—Valuation for Rating Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 42), *s.* 3 (2).

The Valuation for Rating Act, 1953,[1] by section 3 (2) provides that a hereditament used for the letting of rooms singly for residential purposes shall be deemed not to be used for the purposes of a private dwelling or private dwellings (and, therefore, by subsection (1) not used as a " dwelling-house ") if " the whole, or substantially " the whole, of the available accommodation is used for such let- " tings; . . . 'the available accommodation' means so much of " the accommodation in the hereditament . . . as is suitable for " being used for the letting of rooms singly for residential purposes."

A ratepayer appealed against the assessment as a flatlet house of a hereditament containing 17 rooms of which seven were let singly for residential purposes. Four other rooms were suitable for letting but were retained for use by the ratepayer and his family. The Lands Tribunal confirmed the assessment, holding that in order to discover how much accommodation was " available " for letting, there had to be excluded any rooms suitable for letting which were required for use by the ratepayer and his family. Accordingly, the tribunal decided that the whole of the " available accommodation " was let singly for residential purposes. The ratepayer appealed:—

Held, that on the true construction of section 3 (2), the " avail- " able accommodation " meant all those rooms which were suitable for being used for single lettings, irrespective of actual user by the

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[1] Valuation for Rating Act, 1953, s. 3: " (1) Subject to the provisions " of this section, in this Act—the " expression 'dwelling-house' means " a hereditament used wholly for the " purposes of a private dwelling or " private dwellings; . . . (2) For the " purposes of this Act a hereditament " which is used for the letting of " rooms singly for residential purposes " shall be deemed not to be used for " the purposes of a private dwelling " or private dwellings if the whole, or " substantially the whole, of the " available accommodation is used for " such lettings; but save as aforesaid " a hereditament shall not be deemed " for the purposes of this Act to be " used otherwise than wholly for the " purposes of a private dwelling or " private dwellings by reason that one " or more rooms therein are let for " residential purposes. In this sub- " section 'the available accommoda- " ' tion' means so much of the " accommodation in the hereditament " in question as is suitable for being " used for the letting of rooms singly " for residential purposes."

S. 4: " (4) This section shall not " apply to . . . a hereditament where " the premises not used wholly for the " purposes of a private dwelling or " private dwellings are or include " premises used for the purposes of a " hotel, inn, guest-house or boarding- " house or for the letting of rooms " singly for residential purposes."

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ratepayer and his family. Applying that test, substantially the whole of the available accommodation was not used for the lettings indicated, and therefore the premises should be valued as a dwelling-house.

Decision of Lands Tribunal reversed.

APPEAL from the Lands Tribunal (Mr. H. P. Hobbs).

Marshall Byllam Walls (hereinafter called "the ratepayer") appealed from a decision of the Local Valuation Court for Bournemouth given on February 19, 1958, confirming the assessment of a hereditament, 23, Florence Road, Boscombe, of £250 gross value, £205 rateable value. The hereditament was described as a flatlet house, garage and premises.

It was agreed at the hearing that if the hereditament fell to be valued as a "flatlet house" these values were correct, but that if, as the ratepayer submitted, it should be valued as a dwelling-house, then the assessment should be £110 gross value.

The description of the property was agreed as follows: "1. Detached property constructed in brick with tiled roof, with " accommodation on three floors." The accommodation comprised: "Ground floor: Conservatory porch to side entrance; " entrance hall with staircase. (1) Front bed-sitting room fitted " gas point. (2) Front dining room, fitted domestic boiler and " airing cupboard. (3) Kitchen, off . . . No. (2), fitted sink, gas " cooker and old range. (4) Larder off . . . No. (3). (5) Small open " yard, off . . . No. (3), giving access to rear fuel store w.c. (6) " Rear sitting room, fitted gas point. (7) Rear bedroom with " corner bay, fitted gas point. First floor: (8) Front bed-sitting " room (No. 3), fitted lavatory basin and gas point. (9) Front bed-" sitting room (No. 4), fitted lavatory basin and gas point. " (10) Rear bed-sitting room (No. 1), fitted lavatory basin and gas " point. (11) Rear bed-sitting room (No. 2), fitted lavatory basin " and gas point. (12) Bathroom fitted bath, geyser, w.c. and " lavatory basin. (13) Separate w.c. Second floor: (14) Front " bedroom (No. 7), fitted lavatory basin and gas point. (15) Front " bedroom (No. 8), fitted lavatory basin and gas point. " (16) Rear bed-sitting room (No. 5), fitted lavatory basin and " gas point. (17) Rear bed-sitting room (No. 6), fitted lavatory " basin and gas point. Outside: (12) detached wood and c.i. " garage with concrete floor. (19) Lean-to wood with c.i. roof " shed."

The ratepayer and his family occupied the dining room, sitting room, kitchen and larder, one bedroom on the ground floor and two rooms on the second floor. The bathroom was used by everybody. One room on the ground floor, the four rooms on the first floor and two rooms on the second floor were let off as flatlets.

The ratepayer submitted that 12 rooms in the house were suitable for letting singly, and since only seven were so let, this could not be regarded as " the whole, or substantially the whole," and the house ought to be assessed as a private dwelling-house.

For the valuation officer it was submitted that three questions had to be answered: (1) How many rooms were suitable for letting singly? (2) How many rooms were available for letting singly? and (3) How much of the available accommodation was in fact let singly, and did this constitute " the whole, or substantially the " whole," of the available accommodation? As in his view the accommodation occupied by the ratepayer and his family was not available, this left only seven rooms; all these were let singly and, accordingly, the hereditament should be valued as a flatlet house.

On the question of the interpretation of the section, the tribunal agreed with what was said by the tribunal in *Wellington* v. *Woodward*,[2] the relevant part of which reads: " A hereditament " ceases to be a dwelling-house if the whole, or substantially the " whole, of the available accommodation is let. 'Available " 'accommodation' means such accommodation as is 'suitable' " for the letting of rooms singly for residential purposes. The " section is loosely worded, but I think it also implies suitable " accommodation that is 'available' in the ordinary meaning of " the word: the proprietor and his staff must live somewhere. " The tribunal said in *Buckley* v. *Tudge*[3] that the available " accommodation means 'so many of the total number of rooms " 'as in the holiday season are available for letting after the needs " 'of the permanent staff have been met.' Unless the staff " quarters are deemed unavailable, it seems to me that virtually " no premises where rooms are let singly would qualify for assessment other than as a private dwelling."

Every case must rest upon the facts of that particular case. In *Buckley* v. *Tudge*[3] the tribunal found as a fact " that in the " holiday season only two, or at the most three, of the nine bedrooms are reserved for the permanent residents, that the " 'available accommodation' comprises not less than six bedrooms, and that the whole or substantially the whole of this " accommodation is used for letting," and, consequently, found that the premises were a boarding-house.

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[2] (1959) 52 R. & I.T. 73; LVC/1843/1957; 4 R.R.C. 169, 171.

[3] (1957) 51 R. & I.T. 156; LVC/798/1957; 3 R.R.C. 24.

In *Wellington* v. *Woodward*[4] the letting of bedrooms was of a slightly unusual character: "In May, 1956, the appellant agreed "with the proprietor of a nearby hotel that the five bedrooms on "the first floor of his house would be available for letting to the "hotel guests"; and as regards the rest of the house: "In this "case there were on the ground floor three sitting rooms and a "kitchen. During the period when the hereditament was a "boarding-house the third sitting room and the kitchen were "sufficient for the appellants to live in: it is not uncommon in "holiday resorts, during the season, for the owner of a house to "occupy only a small part and let the remainder. When the "hereditament ceased to be a boarding-house I think the dining "room and lounge both became superfluous: that is to say, they "became available in the ordinary sense of the word.

"But were the dining room and the lounge 'suitable' for "letting singly for residential purposes—which presumably means "as bedrooms? The answer again depends upon what is customary in the locality. In a seaside resort it is common practice "for householders to let their ground-floor rooms as bedrooms to "holiday-makers. Lack of running water and the need to go "upstairs to the bathroom and w.c. would be no bar to such a "letting. Had the appellant wanted to let these two rooms, I do "not think he would have had any difficulty in doing so." On these particular facts the tribunal decided: "The accommodation "in this house therefore, available for letting within the meaning "of the Act, comprised five bedrooms upstairs and two rooms "downstairs. Five rooms out of seven rooms is not 'substantially "'the whole' of the accommodation."

During the hearing it was suggested that there was some inconsistency in the above two decisions, but the tribunal was of opinion that in both cases the interpretation set out in *Wellington* v. *Woodward*[4] had been followed. The difference in the answer arises solely from the difference in the facts.

The tribunal was of opinion that the considerations applying to a house where rooms are let off were not necessarily the same as those applying to a boarding-house. In this case the tribunal found that eleven rooms were suitable for letting singly. Three rooms on the ground floor—not the dining room, because in that room there was a domestic boiler for the whole house—four rooms on the first floor, and four rooms on the second floor. For the purpose of being let off as a flatlet a wash basin was very desirable, but a gas point or other cooking facility was essential.

[4] 52 R. & I.T. 73.

The tribunal found that only seven rooms were both suitable and available for letting singly. In premises of that kind, it was usual for the proprietor or a caretaker to live in the house, and where this was so, his needs should be met before rooms came into the category of being available. The size of the ratepayer's family—the proprietor, his wife, a grown-up son and a grown-up daughter—made it desirable that the three rooms on the ground floor, as well as the two second-floor rooms, should be retained.

Seven rooms being available for letting singly, and seven rooms being so let, the whole of the available accommodation was used for letting singly, and the hereditament had to be assessed as a flatlet house, and the appeal was dismissed.

The ratepayer appealed.

F. A. Stockdale for the ratepayer. To decide what accommodation is "available" and "suitable" the hereditament must be looked at as a whole, and for the hereditament to be rateable as a dwelling-house the proportion which is suitable for letting as flatlets must not comprise any substantial proportion of the whole building. The Act looks to suitability rather than availability. In the present case the tribunal found that 11 rooms were suitable but of these only seven were available (the others being occupied by the proprietor and his family), and that that was a substantial proportion of the whole building. The language of section 3 is plain and unambiguous and it was not for the tribunal to add words—as to availability—to achieve what they thought was the intention of Parliament: *Green* v. *Wood*[5] and *Inland Revenue Commissioners* v. *Hinchy*.[6] The principle stated by Maxwell on Interpretation of Statutes, 10th ed. (1953), p. 229, only applies where the statutory language is ambiguous.

J. Raymond Phillips for the valuation officer. If the ratepayer's submission is carried to a logical conclusion it would involve that if an owner occupies the whole of a house, except one room, and he lets that one, that would be sufficient to make the hereditament not a "dwelling-house." Sections 3 and 4 have caused a great deal of difficulty, and either of the two possible constructions, if carried to extremes, produces absurdity. *Buckley* v. *Tudge*[7] was an attempt to avoid absurdity. Subsection (2) of section 3 and the succeeding subsections are only intended to apply to cases where, after applying subsection (1), it is not clear whether the hereditament is a "dwelling-house" or not. It cannot have been the intention of Parliament that the treatment for rating should depend on whether or not the landlord's family happened to live in the hereditament, but, if the ratepayer's submission is accepted, practically every building in which the landlord lives will get the preferential treatment plainly intended only for private dwelling-houses.

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[5] (1845) 7 Q.B. 178.

[6] [1960] 2 W.L.R. 448; [1960] 1 All E.R. 505, H.L.

[7] 51 R. & I.T. 156.

Stockdale was not called on to reply.

LORD EVERSHED M.R. This appeal has raised a question of the construction of section 3 of the Valuation for Rating Act, 1953, which, I must say, has left me with a most unhappy feeling that the parliamentary intention may, in the end, have been defeated. But it is the function of the court to construe the language of the Act. As I think Blackstone said, if Parliament plainly enacts that which is unreasonable, there is nothing that the judges can do to put it right.

Section 3 of the Act opens thus: "(1) Subject to the pro- "visions of this section, in this Act—the expression 'dwelling- "'house' means a hereditament used wholly for the purposes of a "private dwelling *or private dwellings*" (in the plural).

Subsection (2): "For the purposes of this Act a hereditament "which is used for the letting of rooms singly for residential "purposes shall be deemed not to be used for the purposes of a "private dwelling or private dwellings if the whole, or substan- "tially the whole, of the available accommodation is used for "such lettings; but save as aforesaid a hereditament shall not be "deemed for the purposes of this Act to be used otherwise than "wholly for the purposes of a private dwelling or private dwellings "by reason that one or more rooms therein are let for residential "purposes."

Then comes the pregnant sentence: "In this subsection 'the "'available accommodation' means so much of the accommoda- "tion in the hereditament in question as is suitable for being used "for the letting of rooms singly for residential purposes."

The case relates to premises situate in Florence Road, Boscombe, near Bournemouth, a part of the country which, no doubt, during the holiday season at any rate, is attractive to visitors. The total number of rooms on the ground, first and second floors, and excluding two outside sheds and excluding also the porch and the entrance hall, is 17. From those some deductions must be made for present purposes, namely, a kitchen, a larder, an open yard which contains or gives access to a fuel store and a water closet, a bathroom and a separate water closet. The exclusions that I have made leave a total number of rooms which must be considered in the case as 12.

The facts as found are that at the relevant period or relevant time—a phrase to which I will return in a moment—the present appellant and his family were occupying, of the total number of 12, the following: the front dining room on the ground floor, which was fitted with a domestic boiler; the rear sitting room on the ground floor; the rear bedroom on that floor; and two front bedrooms on the second floor—a total of five rooms. The other seven rooms, consisting of a bed-sitting room on the ground floor and six bed-sitting rooms on the first and second floors, all fitted with lavatory basins and gas points, were let individually, separately, singly, for the purpose of residences or private dwellings. On that finding of fact, the question is whether the house in question is excluded from being described as a dwelling-house or as " a hereditament used wholly for the purposes of a private " dwelling or private dwellings " by virtue of subsection (2).

The view of the Lands Tribunal—and let me say at once that it has support from earlier decisions of the tribunal which were quoted, and it has a certain common sense as well—was that this house, when its occupation is analysed in the way I have done, could fairly be said to be excluded, to be deemed not to be used for the purposes of a private dwelling, because the available accommodation was substantially, if not wholly, used for the purpose of letting the rooms singly; and the tribunal quoted certain language used in an earlier case in which the meaning of the essential words in subsection (2) was discussed. The passage cited was: " A hereditament ceases to be a dwelling-house if the " whole, or substantially the whole, of the available accommoda-" tion is let. 'Available accommodation' means such accom-" modation as is 'suitable' for the letting of rooms singly for " residential purposes. The section is loosely worded, but I think " it also implies suitable accommodation that is 'available' in " the ordinary meaning of the word: the proprietor and his staff " must live somewhere." (*Wellington* v. *Woodward*.[1])

The reasoning was to this effect, therefore, that in construing this phrase " available accommodation " one must first exclude from one's mind so much of the accommodation as the proprietor and his family, in the ordinary case, require for themselves. If one does that in the present case, and if one excludes the dining room—and it is agreed that it should be excluded, because it contained the domestic boiler—the result is that of the seven remaining available rooms all of them were let for residential purposes, so that (on this view) the terms of the subsection were satisfied. The question is whether that conclusion is justified.

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[1] (1959) 52 R. & I.T. 73.

It will be observed that one result of that construction would appear to be this, that if a family in the normal course requires to occupy every room in the house—I exclude kitchens, offices and that sort of thing—but one, and that one is let for residential purposes, then it will be said that subsection (2) applies and the house is excluded. Results not much less startling no doubt arise from the opposite view. I would also say here that problems, which fortunately do not now call for determination, may also arise in considering at what point of time the subsection supposes you should form your view. The phrase is "a hereditament "which is used for the letting of rooms." It is, I suppose, notorious that a hereditament may well be used to a substantial extent for the letting of rooms at one season of the year and not at all at another; but fortunately we are not called upon to consider that matter.

For my part, I think there is really no escape from the proposition which Mr. Stockdale put forward, founding himself upon the plain and unambiguous words of the subsection, and in particular the last three lines of it: "In this subsection 'the "'available accommodation' means so much of the accommodation in the hereditament in question as is suitable for being "used for the letting of rooms singly for residential purposes." I can see no escape from substituting for the words "available "accommodation" in the fifth line of the subsection the expanded definition; and if that is done it seems inevitably to follow that, excluding the dining room, eleven of the rooms of the house constitute accommodation in the hereditament suitable for being used for the letting of rooms. Seven only are let. And I cannot think it possible to say that seven out of eleven is "substantially "the whole." If that is right, it is the end of the case.

Mr. Phillips gallantly has tried to introduce some means whereby, notwithstanding the language, some sensible result can be introduced. He has suggested that one first ought to see whether this is a dwelling-house at all within the section. One difficulty, I think, in his way is that that, of course, is not the point which is submitted for our consideration. If Mr. Phillips is right, it might be possible that a tribunal would find as a fact that a particular building was not a dwelling-house; and if it did, that might be the end of it. But I feel, on the whole, that there is considerable difficulty in the way of this view. The language of the section is, "the expression 'dwelling-house' means a "hereditament used wholly for the purposes of a private dwelling "*or private dwellings*"; and, with the experience of the Rent Acts behind us, it might, I should have thought, be difficult to say that a hereditament was not used wholly for the purpose of private dwellings when it contained quite a number of private dwellings each consisting of sublet single bed-sitting rooms; and, indeed, the language of subsection (2), to my mind, proceeds upon that premise.

It is true that there may be some inconsistency between the last words of subsection (4) of section 4 and what is said in this section. But we can only answer this case by construing the language of subsection (2) of section 3 of the Act in the light, of course, of the proper context. And what is, I think, the essence of the tribunal's finding is that it limits the phrase "available accommodation" to so much of the accommodation as is not only suitable but is also left available for letting when regard is had to the normal requirements of the proprietor.

As I say, it is with some regret that I cannot find justification for that expansion of the language. In the circumstances I feel compelled to say that the proprietor here has not been brought within the subsection; that it is not, on the facts, established that substantially the whole of the available accommodation in this house was used for the lettings indicated, and I would therefore allow the appeal.

I should have added that some argument was addressed to the last few lines of the main part of the subsection, "but save as "aforesaid a hereditament . . ." But on analysis it has seemed to me that these lines really carry it no further.

Pearce L.J. I agree. Either contention can produce a very unsatisfactory result, and neither has more appreciable merit than the other; but on the literal construction of the Act the appeal must, I think, prevail.

One must read into the first paragraph of subsection (2), in place of the words "available accommodation," the words set out in the second paragraph as being the definition of the words "available accommodation" namely, "so much of the accommodation in the hereditament in question as is suitable for being "used for the letting of rooms singly for residential purposes." I see no justification for then adding again to the subsection, so

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read, the word "available," for which the definition has been substituted, and using that word "available" in a slightly different sense.

I think that the construction put forward by the appellant follows what was really the intention at the back of the draftsman's mind, although the subsection as phrased has not satisfactorily carried it out. There are three categories of dwelling-house in this connection. There is first the dwelling-house as defined under the main part of section 3, namely, that which is used wholly for the purpose of a dwelling-house. Then one has the second category, which is envisaged in subsection (2) in the words following "save as aforesaid," namely, the dwelling-house that shall not be deemed to have ceased to be a dwelling-house merely because one or more rooms are let therein for residential purposes. And one has the third category which is described in the opening words of subsection (2), where the whole, or substantially the whole, of the available accommodation is used for such letting purposes and, accordingly, the premises have ceased to be a dwelling-house.

But on any view the wording of the subsection can produce an unsatisfactory result. I agree that the appeal should be allowed.

HARMAN L.J. I also agree. Where the language is so unsatisfactory, as this is, the only way is to follow that language and leave the effect for the decision of the legislature. It is not for this court to attempt legislation.

Appeal allowed with costs; legal aid taxation of the ratepayer's costs as between solicitor and client.
Leave granted to appeal to the House of Lords conditional upon the valuation officer not asking for costs or seeking to disturb the order as to costs in the Court of Appeal.

Solicitors: *Walmsley & Stansbury for E. W. Marshall Harvey & Dalton, Bournemouth; Solicitor for Inland Revenue.*

E. D.

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Lord Parker C.J., Hilbery and Pearson JJ.

Criminal Law—Corruption—Public body—Intention—Relevance of motive—Meaning of "corruptly"—Public Bodies Corrupt Practices Act, 1889 (52 & 53 *Vict. c.* 69), *s.* 1.

The appellant was charged with corruption contrary to section 1 (2) of the Public Bodies Corrupt Practices Act, 1889,[1] in that he corruptly offered a gift to the mayor of the Borough of Castleford in order that the mayor should use his influence in favour of the appellant with the council of the borough. At his trial the appellant admitted that the offer of a gift was made to the mayor but contended that it was not a genuine offer and was made for the purpose of exposing corruption which he, the appellant, thought existed at the time; that if the mayor had accepted the offer he would then have exposed him, and that he did not in fact want any favour to be shown to him. He was convicted and appealed against his conviction on the ground that the judge had misdirected the jury by stating that the motive for making the offer was irrelevant, and that the word "corruptly" in the section meant "with the intention to corrupt the person to whom "the offer was made":—

Held, (1) that the judge's direction was correct and that the intention of the appellant to offer a gift in order to get the mayor's agreement in principle to the transaction was sufficient to support the conviction.

(2) That the word "corruptly" as used in the Act denoted that the person making the offer did so deliberately and with the intention that the person to whom it was addressed should enter into a corrupt bargain.

Dictum of Willes J. in *Cooper* v. *Slade* (1858) 6 H.L.C. 746, 773 applied.

Appeal against conviction.

The appellant, John Smith, together with one Leslie Lockyer, was indicted at Leeds Assizes on July 22, 1959, for corruption contrary to section 1 (2) of the Public Bodies Corrupt Practices

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[Reported by A. D. Rawley, Esq., Barrister-at-Law.]

[1] Public Bodies Corrupt Practices Act, 1889, s. 1 (2): "Every person "who shall by himself or by or in "conjunction with any other person "corruptly give, promise, or offer any "gift, loan, fee, reward, or advan- "tage whatsoever to any person, "whether for the benefit of that per- "son or of another person, as an "inducement to or reward for or "otherwise on account of any mem- "ber, officer, or servant of any public "body as in this Act defined, doing "or forbearing to do anything in "respect of any matter or transaction "whatsoever, actual or proposed, in "which such public body as afore- "said is concerned, shall be guilty "of a misdemeanour."

Act, 1889, in that he on January 27, 1959, corruptly offered a gift, namely, a part of the sum of £500, to Adam James, mayor and alderman of the Borough of Castleford, as an inducement to him to use his influence in the consideration of the sale of a portion of land by the council of the borough to the appellant. Both the appellant and Lockyer were convicted and sentenced to 12 months' imprisonment. By leave of the court Smith appealed against his conviction on the ground that the gift was not corruptly offered by him, because although he admittedly intended that it should be offered to the mayor or some councillor as a bribe, he never intended to carry the matter any further; that his intention was to get the mayor or other councillor to accept the idea that he, the appellant, would pay money in exchange for favours, and that then he would be in a position to expose the mayor or councillor; and that at no time did he intend the matter to go through so that he would in fact obtain any favour from the council.

The facts are more fully stated in the judgment.

P. Stanley Price Q.C. and *D. M. Savill* for the appellant. "Corruptly" in section 1 (2) of the Public Bodies Corrupt Practices Act, 1889, means "with a view to undue favour being "shown or received." Here the appellant's intention was to expose corruption before any money had passed. His intention was not to corrupt but to expose. [Reference was made to the meaning of "corruptly" in the Oxford English Dictionary.] The appellant at no time intended to give any money; he never intended to go any further than to hand over the IOU. On the other hand, if the mayor had signified his present willingness to accept a future bribe, then he would have been corrupted.

[HILBERY J. You say it is one thing to make a genuine offer and another thing to make a dummy offer. The appellant's case is that this was a dummy offer.]

Yes. The appellant's motive was to expose corruption.

[HILBERY J. Motive only goes to mitigation.]

Motive must affect the meaning of "corruptly" as it is used in the subsection. If all that "corruptly" means is the intention to offer money without more, then it adds nothing to the meaning of the subsection and is otiose. A meaning must be given to every word in an Act of Parliament, and "corruptly" must here mean that the person who offers the money does so with an evil or dishonest motive. If the appellant had intended the transaction to go through to his own benefit so that he received a favour, then he would have had an evil or dishonest motive and therefore would have acted corruptly. But that was not the case here. [The *Bewdley Election Petition*[2] and the *Bradford Election Petition (No. 2)*[3] were referred to.] The minority view in *Cooper* v. *Slade*[4] to the effect that "corruptly" did add something to the subsection there under consideration was right. It is the same in this case; "corruptly" means with an evil intention—"corruptly" has a special meaning. See the distinction made between "corruptly" and "knowingly" in section 1 of the Prevention of Corruption Act, 1906, and see *Sage* v. *Eichholz*[5] on this point.

W. A. B. Goss for the Crown. "Corruptly" does add to the meaning of the subsection in certain circumstances: it is necessary in dealing with the case of a reward for services rendered. In this case the judge's direction was right. It matters not that the motive of the appellant was to expose corruption; by doing what he did, he attempted to corrupt the mayor and thereby corruptly promised a gift. That is an offence under this subsection. Motive is entirely irrelevant. If a policeman breaks the law in order to catch another committing an offence, he himself commits an offence although his motive may not be evil or dishonest: see *Brannan* v. *Peek*.[6]

Stanley Price Q.C. in reply. "Corruptly" in the subsection means that the offender must know that he is doing something wrong, and intend to do so.

LORD PARKER C.J. delivered the following judgment of the court: This is a curious case, and some of the facts need to be stated. The appellant's wife apparently had a plot of land adjoining their house which, it was thought, would be suitable together with other land, if it could be obtained, as a petrol filling station. The appellant was minded to persuade the Castleford Borough Council to let him have part of their adjoining land for that purpose. There is no doubt that on January 27, 1959, when Lockyer, who was an insurance agent, came to collect a premium, the appellant drew up an IOU for £500 and handed it to Lockyer, and there is no doubt that when Lockyer left the house the appellant knew that Lockyer would offer it as a bribe to some councillor. That is what he said. Lockyer, in fact, went

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[2] (1869) 19 L.T. 676.
[3] Ibid. 723.
[4] (1858) 6 H.L.C. 746.
[5] [1919] 2 K.B. 171; 35 T.L.R. 382.
[6] [1948] 1 K.B. 68; 63 T.L.R. 592; [1947] 2 All E.R. 572.

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to the town hall and obtained an interview with the mayor and offered him what is said to be the lion's share of that £500. The mayor did not agree to any such thing, and eventually the appellant and Lockyer were charged.

That is really only half the story because this appellant, on any view, is an extraordinary man. For years and years he has been convinced that there is corruption among the police. Then his mind turned to corruption amongst the magistrates, and at this time his mind was on corruption among members of the Castleford Borough Council. He wrote a number of letters just after the time when this offer was made by Lockyer inviting members of the press, the police, and goodness knows whom, to come down because he was going to expose some fraud. His case was that, although he intended Lockyer when he left the house to take the IOU to the mayor or some councillor and to offer it, or part of it, as a bribe, he never intended to carry the matter any further. In other words, his intention was to get the mayor or other councillor to accept in principle the idea that he, the appellant, would pay money in exchange for favours, and that then he would possibly hand over marked notes or, at any rate, be in a position to expose the mayor or councillor; and that he never intended the matter to go through so that he would obtain in fact any favour from the council. That was his case.

When the trial judge came to sum up, that case in effect was withdrawn from the jury. It was never left to the jury to consider what the appellant might have done in the long run. The judge ruled that whatever the appellant's motive, if he did intend to get the mayor's agreement to accept money for a favour to be shown an offence had been committed.

Section 1 (2) of the Public Bodies Corrupt Practices Act, 1889 (hereinafter called "the Act"), provides that: "Every person "who shall by himself or by or in conjunction with any other "person corruptly give, promise, or offer any gift, loan, fee, "reward, or advantage whatsoever to any person, whether for the "benefit of that person or of another person, as an inducement to "or reward for or otherwise on account of any member, officer, or "servant of any public body as in this Act defined, doing or "forbearing to do anything in respect of any matter or transaction "whatsoever, actual or proposed, in which such public body as "aforesaid is concerned, shall be guilty of a misdemeanour."

The trial judge, after reading that subsection to the jury and pointing out that the object of the subsection was to protect people in public life from having the temptation of being offered gifts to do something in carrying out their public duties, went on in these terms: "The next thing to note is the word 'corruptly.' "You will notice the words 'corruptly give or offer.' What does "the word 'corruptly' mean? This is law and I am telling you "this as law, 'corruptly' there means with the intention to "corrupt. In other words, if I offer you a reward in order that "you should do something which may help me, or if I am offering "and hoping that the offer will induce you to act in the way in "which I want you to act, I am doing it corruptly. Motive does "not matter; it may be that I do it because I am anxious to help "myself; it may be that I am anxious to help a widow, who, "perhaps, is starving and whom I think I can help by getting a "public official, a person in public life, to do something which "would help her. In one sense I suppose it could be said that "any such act sprang from the best possible motive, the "endeavour to help. It does not matter; when I offer you that "gift I do it with the intention that you should so receive a "reward for doing something in connection with your public "duties. This is the meaning of the word 'corrupt'—intent to "corrupt, the intention to corrupt the person to whom the offer is "made."

It is that direction which is challenged on this appeal and is said to be wrong. It is, perhaps, a matter to some extent of words. I do not think that Mr. Stanley Price, who has argued this matter with great care for the appellant, would object to that definition of "intent to corrupt" if by that is meant to corrupt in the full sense, namely, an intention not merely that the mayor would accept the offer in principle, as in the present case, but also that money would thereafter be paid and accepted and a favour be received, in other words, if the intention was throughout that the transaction should go through to the benefit of the appellant. Read in that sense, Mr. Stanley Price would not object to the definition, but in the sense in which it was used by the judge, it is quite clear that he was saying that the undoubted intention of this appellant to offer the IOU in order to get the mayor's agreement in principle to the transaction was in itself an intention to corrupt which was sufficient to support the conviction.

It should be observed that section 1 (1) of the Act provides that: "Every person who shall by himself or by or in conjunction "with any other person, corruptly, solicit or receive, or agree to "receive, for himself, or for any other person, any gift, loan, fee, "reward, or advantage whatever as an inducement to, or reward "for, or otherwise on account of any member, officer, or servant "of a public body as in this Act defined, doing or forbearing to do "anything in respect of any matter or transaction whatsoever, "actual or proposed, in which the said public body is concerned, "shall be guilty of a misdemeanour."

In the present case, as I have said, the admitted intention was that the mayor would agree to receive money and, accordingly, the intention undoubtedly was that the mayor should agree to something which itself constituted an offence and, indeed, constituted an offence of corruption within the very same section. The sole question, for the purposes of this case, as it seems to the court, is whether the word "corruptly" in its context means deliberately offering money, or whatever it may be, with the intention that it should operate on the mind of the person to whom it is made so as to make him enter into what I may call a corrupt bargain, or whether it means that the intention must be that the transaction should go right through and that the offeror should obtain the favour for which he sought. It seems to this court that the word "corruptly" here used (and it is a word which appears throughout the Act and other Acts dealing with corruption) is used in the former sense, namely, that it denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain.

The real argument to the contrary, and it is an argument which has been pressed upon this court, quite rightly, is that if that is all that "corruptly" means, then it really adds nothing to the words that are already there in section 1 (2) of the Act. That, to a large extent, may be true, but it seems to this court that the word "corruptly" in the sense to which I have referred may well be necessary in section 1 (2) in the case of rewards or fees given for services or favours already rendered. The matter has arisen in dealing with election petitions under the Corrupt Practices Prevention Act, 1854. It is unnecessary to read it in detail but, broadly speaking, it provided, by section 2, that every person who should give or offer money to a person to vote in a particular way would be guilty of an offence. Secondly, that anybody who "corruptly" did such an act on account of a voter having voted in a particular way should also be guilty of an offence. In regard to the offer to vote in a particular way, the word "corruptly" is not used, but in so far as it is dealing with the past, the reward for voting in a particular way, the word "corruptly" does appear.

The matter came before the House of Lords in *Cooper* v.

Slade [1] in 1857. Three questions were referred by Lord Cranworth L.C. to the judges. There was a division of opinion but, in the opinion of the majority, the word "corruptly" where used in connection with a reward to somebody who had voted was held in effect to add nothing. Willes J., who was one of the majority, said [2]: "In answer to the third question, I am of opinion that "there was evidence that the defendant corruptly paid money to "Carter on account of his having voted at the election. I think "the word 'corruptly' in this statute means not 'dishonestly,' "but in purposely doing an act which the law forbids as tending "to corrupt voters, whether it be to give a pecuniary inducement "to vote, or a reward for having voted in any particular manner. "Both the giver and the receiver in such a case may be said to act "'corruptly.' The word 'corruptly' seems to be used as a "designation of the act of rewarding a man for having voted in a "particular way as being corrupt, rather than as part of the "definition of the offence."

The minority view, which was expressed by, amongst others, Coleridge J., was to the effect that "corruptly" did add something. He said [3]: "As a general rule, no doubt, the party's "knowledge of the law is immaterial, or perhaps is to be conclusively presumed; but here the statute expressly makes the "operating motive in the mind of the party material, and it adds "that that motive must be corrupt; which is as much as to say, "that it may operate honestly and without intent to interfere with "the purity of election." Although the view of the majority was that the word "corruptly" added nothing, the words in the present case are different and there is certainly force in the view that the word "corruptly" may be necessary in dealing with the case of a reward for services rendered. Accordingly, it is wrong to say that the word "corruptly" cannot be given some meaning additional to what is provided by the words of the section without it.

The view which we have formed is, we think, confirmed by the passage I have already quoted from Willes J. in *Cooper* v. *Slade*.[4] I will read it again: "I think the word 'corruptly' "in this statute means not 'dishonestly,' but in purposely doing "an act which the law forbids as tending to corrupt voters." It seems to this court that those words apply in the present case. The mischief aimed at by the Act, as the judge told the jury, was

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[1] (1858) 6 H.L.C. 746.

[2] Ibid. 773.

[3] Ibid. 785.

[4] Ibid. 773.

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to prevent public officers or public servants being put in a position where they are subject to temptation. Accordingly, to adopt the words of Willes J., the appellant even on his own case was here purposely doing an act which the law forbids as tending to corrupt voters. It seems to this court, therefore, that on the facts of this case the direction given by the trial judge was perfectly correct, and that there are no grounds for quashing this conviction. Accordingly, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

1959
Dec. 3, 4, 8.

Paull J.

SCHNEIDER *v.* EISOVITCH.

SAME *v.* SAME.

[1956 S. Nos. 226 and 227.]

Negligence—Duty of care to whom—Shock—Death of husband—Negligence of driver of motor-vehicle—Wife injured and rendered unconscious in same accident—Wife later told of husband's death—Liability of driver to wife for shock.

Damages—Remoteness of damage—Expenses of third party—Expenses of friends for services to plaintiff after motor-car accident—No legal liability on plaintiff to pay friends—Liability of driver to plaintiff.

Damages—Remoteness of damage—Novus actus interveniens—Wife told by third party that husband was dead—Shock—Whether caused by negligence causing death of husband.

Fatal Accidents Acts—Damages—Payment of debt of estate—Estate consisting of business and insurance policies—Estate bankrupt when insurance policies disregarded—Father pays debts—Whether amount of debts to be deducted from damages.

The plaintiff and her husband, while on holiday in France, were being driven in a motor-car by the defendant. Owing to his negligence there was an accident in which the plaintiff's husband was killed outright and the plaintiff herself was injured and rendered unconscious. She was taken to hospital, and when she recovered consciousness she was told that her husband had been killed. As a result she suffered shock. She brought two actions against the defendant, one for damages for personal injuries and the other under the Fatal Accidents Acts, 1846 to 1908, on behalf of herself and her two children for damages for the loss of their dependency.

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

In her action for personal injuries the plaintiff sought to recover £110 expenses incurred by her brother-in-law and his wife when they flew out to France to assist her back to England, and to make arrangements for her husband's body to be brought back to England for burial. The plaintiff also claimed general damages for shock caused by her husband's death. The defendant contended that he was not liable to the plaintiff for the £110 expenses since the plaintiff herself was not under any legal obligation to pay those expenses to her brother-in-law and his wife; they had not been asked by the plaintiff to perform the services and there was no implied contract to pay. The defendant further contended that the plaintiff could not recover damages for shock at her husband's death since she did not see him killed, and thus was not within the ambit of the duty owed by him; moreover, that she was told of her husband's death by a third party some time later, and that this was a novus actus interveniens:—

Held, (1) that the expenses were recoverable if three conditions were satisfied:—(a) the services were reasonably necessary as a consequence of the tortfeasor's act; (b) the expenses were reasonable in amount and expenses would have been incurred had the friends not assisted, and (c) the plaintiff undertook to pay the sum awarded to the friends. All three conditions were satisfied here and, accordingly, the plaintiff was entitled to recover the £110 (post, p. 440).

Allen v. *Waters & Co.* [1935] 1 K.B. 200; 51 T.L.R. 50 and *Dennis* v. *London Passenger Transport Board* (1948) 64 T.L.R. 269; [1948] 1 All E.R. 779 considered.

(2) That the defendant owed a duty to the plaintiff to drive with reasonable care and was in breach of that duty; the plaintiff, therefore, having a cause of action for the negligence of the defendant, was entitled to add damages for shock, caused by hearing of her husband's death, to the amount recoverable in the action; the fact that a period of time elapsed before the news was heard made no difference, provided that the news was a consequence which flowed directly from the breach of duty (post, pp. 441, 442).

In re Polemis and Furness Withy & Co. Ltd. [1921] 3 K.B. 560; 37 T.L.R. 940 applied.

Hambrook v. *Stokes Brothers* [1925] 1 K.B. 141; 41 T.L.R. 125; and *Bourhill* v. *Young* [1943] A.C. 92; [1942] 2 All E.R. 396 distinguished.

The deceased's estate, which passed to the plaintiff, consisted of a butcher's business and insurance policies. The debts of the business exceeded the money due by £549 but the deceased's father took over the business, paying nothing for it, but discharging all the debts. Had the plaintiff kept the business she would have had to pay the debts out of the insurance policy moneys. Without the policies the estate was bankrupt. It was contended that the plaintiff had benefited from the deceased's estate to the extent of £549, and that this sum should be deducted from the damages awarded under the Fatal Accidents Acts:—

Held, that no sum was deductible from the amount awarded under the Fatal Accidents Acts unless there was a balance in favour

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of the estate after disregarding the factors which by law had to be disregarded. In this case, disregarding the insurance moneys, the estate was bankrupt. Accordingly, the defendant was not entitled to deduct £549 from the damages (post, pp. 444, 445).

ACTION.

In the first action the plaintiff, Mrs. Betty Schneider, sued the defendant, Lazarus Eisovitch, for damages for personal injuries sustained in a motor accident on May 14, 1955; in the second action she sued the defendant as widow and administratrix of the estate of her deceased husband, Raphael Samuel Schneider, who was killed in the same accident, for damages under the Fatal Accidents Acts, 1846 to 1908, for herself and her two children. By an order dated July 31, 1957, the district registrar of the Brighton District Registry ordered the two actions to be consolidated. At the trial liability was admitted in both actions.

The facts are fully set out in the judgment.

Eric Myers for the defendant. The plaintiff is not entitled to recover the £110 expenses incurred by her brother-in-law when he and his wife flew out from England to assist her. The plaintiff is under no legal liability to pay those expenses to her brother-in-law, because there was no contract either express or implied that she should do so. What was done by the brother-in-law was done voluntarily and not at the request of the plaintiff. At the most she is only under a moral obligation to pay these expenses to the brother-in-law; that is not a good ground for holding that the defendant must pay them to the plaintiff. The law only has regard to legal liabilities and can only reimburse the plaintiff for sums she must in law pay for any assistance given to her. The fact that the plaintiff undertakes to pay the expenses over to the brother-in-law, if they are allowed, makes no difference to the position. As to damages for the shock of her husband's death, the plaintiff is not entitled to recover, because she was told of his death. The authorities show that a plaintiff can recover for shock resulting from injuries to a close relative, if the injuries are inflicted within the sight of the plaintiff. A plaintiff cannot ever recover for shock resulting from news.

[PAULL J. But here the plaintiff was owed a duty by the defendant to drive carefully. The shock is a result of the breach of that duty.]

Once the plaintiff went to hospital, there was no longer any duty owed by the defendant. The plaintiff suffered damnum but no injuria when she heard in hospital that her husband was dead. The fact that someone told the plaintiff of her husband's death was a novus actus interveniens.

Hambrook v. *Stokes Brothers* [1] is authority for the proposition that you can recover damages for shock for what you see but not for what you are told. [*Bourhill* v. *Young* [2] was also referred to.] If the plaintiff had been unconscious for three weeks and had then been told of her husband's death by a doctor, she could not then recover for shock; the result of the tort had come to an end at the time of the shock. Here a third person caused the shock; the defendant was not present at the time. The defendant should be in control of the situation which causes the shock. [Reference was made to passages from Lord Macmillan's speech in *Bourhill* v. *Young*.[3]] In *Owens* v. *Liverpool Corporation* [4] the plaintiffs recovered for nervous shock when they saw a coffin overturn. The law should not be extended any further bearing in mind the decision in *Hambrook* v. *Stokes Brothers* [5] and Lord Macmillan's speech in *Bourhill* v. *Young*.[6]

From the damages awarded under the Fatal Accidents Acts there must be deducted £549. This sum represents the amount of the debts of the business which the plaintiff inherited from her husband. In fact the deceased's father took over the business, paying nothing for it but discharging the debts. Had the plaintiff kept the business, she would have had to pay the debts out of the insurance policy moneys. She is therefore better off by £549, and to that extent she has benefited from her husband's estate.

[PAULL J. Insurance moneys are not to be taken into account in assessing damages.]

Martin Jukes Q.C. and *F. B. Purchas* for the plaintiff. The plaintiff is entitled to recover the expenses incurred by her brother-in-law and his wife when they flew to her assistance. *Allen* v. *Waters & Co.*[7] shows that the criterion in these matters is not a strict legal liability between a plaintiff and a third party. It was reasonable and proper for her relations to go to the plaintiff's assistance. She could have employed someone to bring her home and could well have recovered the cost of such employment.

[1] [1925] 1 K.B. 141; 41 T.L.R. 125.

[2] [1943] A.C. 92; [1942] 2 All E.R. 396.

[3] [1943] A.C. 92, 103.

[4] [1939] 1 K.B. 394; 55 T.L.R. 246; [1938] 4 All E.R. 727.

[5] [1925] 1 K.B. 141; 41 T.L.R. 125.

[6] [1943] A.C. 92, 103.

[7] [1935] 1 K.B. 200; 51 T.L.R. 50.

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At the least she could recover a reasonable sum. *Dennis* v. *London Passenger Transport Board*[8] is authority for the proposition that, where a plaintiff is only under a moral obligation to repay a third party for expenses incurred as a direct result of the defendant's wrongful act, the plaintiff can recover those expenses from the defendant. In the present case expense was incurred as a result of the defendant's tort. It would have been unreasonable, if not impossible, for the plaintiff to have done for herself what her relations did for her. There was no contract, express or implied, to repay the sick pay and pension in *Dennis's* case.[8] Even if there is no implied contract to repay the expenses here, the plaintiff can recover them because she is under a moral obligation to repay comparable to the obligation in *Dennis* v. *London Passenger Transport Board.*[8] It cannot be said that the conduct of the plaintiff's relations was unreasonable or that the expenses themselves were unreasonable.

The plaintiff is entitled to recover damages for the shock of her husband's death. The real question here is whether there has been a wrongful act or breach of duty on the part of the defendant vis-à-vis the plaintiff. That is how it was put by Lord Macmillan and Lord Wright in *Bourhill* v. *Young.*[9] Once there has been a breach of the duty of care owed to a person the party at fault is liable to that person for everything that flows from the negligent act, whether or not it could have been foreseen as a natural and probable result of the negligent act: see *In re Polemis and Furness Withy & Co. Ltd.*[10] The defendant, by his negligent driving, was in breach of his duty of care to the plaintiff; all the damage she suffered as a result of that breach is recoverable.

[PAULL J. Was there a cause of action? That is the ratio of *Bourhill* v. *Young*,[11] as is pointed out in Salmond on Torts, 12th ed. at pp. 405, 406.]

In this case the knowledge that her husband was dead was bound to come to the plaintiff at some time or other. The shock was that he was dead. The position is exactly the same if the plaintiff had recovered consciousness in the ambulance and had suffered shock at the sight of her husband's dead body. If a head of damage does not ordinarily give a cause of action because it is damnum sine injuria, nevertheless it may be recoverable if it is consequent upon another sustainable cause of action: see *Lampert* v. *Eastern National Omnibus Co. Ltd.*[12]

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[8] (1948) 64 T.L.R. 269; [1948] 1 All E.R. 779.

[9] [1943] A.C. 92, 103, 106.

[10] [1921] 3 K.B. 560; 37 T.L.R. 940.

[11] [1943] A.C. 92.

Cur. adv. vult.

1959. Dec. 8. PAULL J. read the following judgment: There are two actions before me: one by Betty Schneider in her own right, and the other by her as the widow and administratrix of her late husband, Raphael Samuel Schneider. In each case the defendant is Lazarus Eisovitch.

In May, 1955, Mr. and Mrs. Schneider and Mr. and Mrs. Eisovitch were on holiday together in France, having arranged to go to the south of France together in a motor-car belonging to one Taylor, the brother of Mrs. Schneider's husband. On May 14, 1955, the defendant was driving that motor-car along the road between Lyons and Paris with his wife and Mr. and Mrs. Schneider as passengers. For some reason which is unknown to me, but which apparently involved a small child coming on to the road, the motor-car left the road and crashed into a tree and a ditch alongside the road. As a result of that crash Schneider was thrown out of the car and instantly killed and the plaintiff was rendered unconscious. It is not disputed that that accident was caused by the negligence of the defendant. The plaintiff was taken to a hospital nearby in a place called Villefranche and did not recover consciousness until after she was in hospital. Her injuries were surprisingly slight considering the way in which the accident happened. She had a Colles fracture of the left wrist; she had two small cuts on her leg each involving one stitch, and very severe bruising all over the left side of her head and round the left eye. In addition she had a severe blow on the temporal bone which probably was the cause of the concussion from which she suffered. Having recovered consciousness she was informed of the fact that her husband had been killed and there is no doubt whatsoever that the shock of that information coming on the top of the shock she suffered owing to her physical injuries has had quite serious consequences.

When Taylor heard of the accident and heard that his brother had been killed and his sister-in-law was lying in a French hospital apparently seriously injured, he and Mrs. Taylor at once flew out to her assistance. It is admitted by Mr. Myers, who appeared on behalf of the defendant, that that visit was not made because

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[12] [1954] 1 W.L.R. 1047; [1954] 2 All E.R. 719.

Mr. Taylor's motor-car was smashed (that would have been seen to by a motoring organisation or the insurance company concerned) but because Taylor felt that the situation, so far as his sister-in-law was concerned, was such that help must be afforded to her in the double task of bringing back her husband's body to England and returning to England herself. Mr. and Mrs. Taylor remained in Villefranche for some five days and then accompanied the plaintiff back to England. I have no doubt that in the circumstances it was necessary for someone to help the plaintiff and that if Mr. and Mrs. Taylor had not flown out on their own initiative, either the plaintiff would have telegraphed asking them to come, or, alternatively, the plaintiff would have had to make arrangements for a nurse to accompany her home and also to employ somebody to see about the arrangements for transporting the coffin to England. The plaintiff could not speak French and was therefore in an impossible position, injured as she was, without some assistance being given to her.

Having arrived home the plaintiff came under the care of Dr. Paul. She was, in Dr. Paul's words, in quite a bad physical condition. The wrist had to be re-broken and re-set. The physical signs of injuries, however, cleared up in about three to four months. The mental signs did not. The whole of the episode produced considerable shock due to two factors, the accident itself and the subsequent knowledge obtained in hospital that her husband had been killed while sitting alongside her. The result of that shock was perpetuated by her day-to-day feeling of loss and the consequent upheaval in her life.

She developed neuro-dermatitis (that is, dermatitis brought about by mental shock) affecting her face, ears, scalp and neck, and later her chest. The original attack died down fairly shortly but continued to exist in a mild form with flare-ups every now and again. It went on longer than might be expected and was worse than would be expected, even taking into consideration the shock of the accident and the shock of her husband's death. She became depressed; the depression continued, varying in intensity, and has lately got worse. In addition to Dr. Paul, she has seen a dermatologist and has also been under a psychiatrist, Dr. Doris Small. Both gave evidence before me.

In order to understand the plaintiff's mental condition, it is necessary to go into the history of the plaintiff and her late husband. The plaintiff is a naturally somewhat highly-strung woman who married Mr. Schneider in June, 1953, the plaintiff being 38 and her late husband being 45. Both she and her late husband had been married previously, both the earlier marriages having been dissolved. The accident happened within two years of the marriage. During that time the marriage had been a happy one, and I have no doubt that the plaintiff must have felt that she had achieved happiness and security. Her husband was a kosher butcher who had started business on his own account after the war in 1946, and the plaintiff in the early days of their marriage helped to look after the desk side of the business, she having been accustomed before marriage to that sort of work. From shortly before the birth of their son in April, 1954, the plaintiff ceased to work in the shop. Shortly after that birth the plaintiff and her husband adopted a girl three years older than their son. The plaintiff, her husband, the two children, and the plaintiff's mother were the family living together, the plaintiff keeping house.

After the husband's death, his father, who also had been a kosher butcher but had lost his Ministry of Food licence during the war and since the war had helped in his son's shop, took over his son's business. For a time the plaintiff helped at the desk and during that time her mental condition improved. Then the business was sold, and the plaintiff had no outside interests. There is no doubt that the plaintiff, without a husband to help her, has found life difficult. The psychiatrist, Dr. Small, in her report uses the phrase that the plaintiff has developed a considerable unconscious hostility towards her mother upon whom she is emotionally dependent. As far as I can gather, all that means is that without a man's help she finds life difficult when she, two young children and an elderly mother all live together and she has no outside interests to take her mind off her tragedy.

With this statement of facts I come to the questions raised in the action for damages for her own injuries. Two interesting problems arise. These are: (1) Is the plaintiff entitled to recover the expenses of Mr. and Mrs. Taylor, amounting to £110? (2) To what extent ought I to take into account in assessing general damages the element of shock and its consequences?

(1) Mr. Myers for the defendant contends that I cannot allow any part of the expenses of Mr. and Mrs. Taylor. He points out that there was no request by the plaintiff to them to come to her assistance. There could not be. They left England when the plaintiff was either unconscious or nearly so. There can, therefore, says Mr. Myers, be no implied contract to pay their expenses. That is admitted by the plaintiff, who says that she agrees that the Taylors cannot demand payment from her, but that she feels

under a moral duty to repay them out of any damages. If I allow the expenses, she undertakes to pay the money over to Mr. and Mrs. Taylor. Mr. Myers says that that is not enough; the law only recognises legal liabilities and can only recoup the plaintiff in respect of sums she has in law to pay for any assistance given to her. In any event, says Mr. Myers, there was no necessity for them to go to the plaintiff's assistance.

At first, I felt that there was a great deal to be said in favour of Mr. Myers' argument. How can one make the defendant pay a sum incurred voluntarily by a third party? The more I have thought about the matter, however, the more uncertain I have become that this is right. The plaintiff, particularly as she speaks no French, had of necessity to have help. She was entitled to hire help. When Mr. and Mrs. Taylor arrived she could have refused their services, while still treating them as friends, and hired an English-speaking nurse to accompany her home and an English-speaking man to arrange the innumerable details necessary before her husband's body could be brought back to England. To accept instead the voluntary services of Mr. and Mrs. Taylor was, to say the least, reasonable, and if she had said at the time: "If you help me and save me the expense of hiring services I will "repay you your fares," there would have been a legal liability to pay. Must the rights of a plaintiff lying seriously ill depend on whether or not those words are used? Can the defendant now object to pay simply because those words were not uttered? That must depend upon whether the liability of the defendant is limited to reimbursing only strictly legal liabilities of the plaintiff, or whether among the consequences for which the defendant must pay can be included a friend's out-of-pocket expenses for rendering necessary assistance. If I am negligently knocked down and rendered unconscious, may I not recover from the person responsible a sum paid to reimburse a friend who voluntarily hired and paid for a car to take me to a hospital while I was unconscious? Yet legally I could refuse to pay.

Mr. Jukes has drawn my attention to two cases which I think assist me. In *Allen* v. *Waters & Co.*[1] a landlord negligently failed to keep premises in proper repair. A tenant's wife was injured and the London County Council claimed against the tenant the cost of the wife being an in-patient in one of their hospitals. The tenant and his wife sued the landlords in negligence and the tenant claimed the sum claimed by the London

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[1] [1935] 1 K.B. 200; 51 T.L.R. 50.

County Council. A question arose whether in the particular circumstances the London County Council had a legal right to the sum claimed. The county court judge had included the amount in the damages awarded. Lord Hanworth M.R. and Romer L.J. thought the London County Council had the right to recover the sums. Goddard J. thought they had not. I do not think that the headnote is accurate in respect of the first finding, which reads as follows: " (By the whole Court of Appeal) that whether or not " the hospital expenses were recoverable by the council from the " tenant, more than six months having elapsed since the dis- " charge of the patient from hospital, the county court judge was " entitled in assessing the special damages to take these expenses " into account and to award their amount for payment over to " the council." What the Master of the Rolls said was that it was immaterial that the plaintiff had not actually paid the sum to the hospital since there was a legal liability to pay the sum. In that judgment Romer L.J. concurred. Goddard J., however, went further. Having found that there was no legal liability on the part of the plaintiff to pay the London County Council since the London County Council had not claimed it from the plaintiff within six months of the claim arising, he goes on to say[2]: " Whether or not the hospital charges can properly be included " in the damages awarded to the husband does not seem to me " to be a question to be determined by the decision of the county " council at any particular time not to call on him to pay because " he is unable to or, at least, unable to unless he can recover the " money from somebody else. I do not think that the right view " depends on whether the remedy against the husband is barred, " or the people who have the right to recover the hospital charges " have or have not yet determined to sue for them, but whether " in sending the woman to hospital a reasonable and proper thing " was done. If it was, and if an expense has been incurred by " doing so, I think it is right that the wrongdoer should bear that " cost. Any sum which is now recovered by the husband will be " held by him for the hospital and will have to be paid by him to " the hospital." A little lower down he goes on[3]: " For these " reasons I think that the money is properly recoverable and that " the county court judge was right, in the result, in making the " order which he did."

I do not think that the words of Goddard J. cover this case, as in that case there was originally a legal liability subject to a time limit within which the sum had to be claimed; but at least it shows that in his judgment these matters are not to be judged by the test of strict legal liability.

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[2] [1935] 1 K.B. 200, 215.

[3] Ibid.

The other case is *Dennis* v. *London Passenger Transport Board*,[4] where it was held that although the plaintiff had received the equivalent of his wages by way of pension and sick pay he could nevertheless recover his wages if he undertook to repay the sick pay and the pension, as when he received the sick pay and the pension he was told he would be expected to return the money if he recovered compensation from a third party. In the course of his judgment, Denning J. said[5]: " . . . a wrongdoer is not to be "allowed to reduce damages by the fact that other people have "made up to the plaintiff his wages," and held that the plaintiff could recover his wages on an undertaking to repay the sums received, although there was no legal liability to repay.

In my judgment, strict legal liability is not the be-all and end-all of a tortfeasor's liability. A plaintiff cannot claim a sum of money because he would like to pay a friend for his services. That would alter the character of the services given. The services must be treated as friendly services given freely by a friend. But to pay out-of-pocket expenses in respect of necessary services freely given does not alter the character of the services. I do not think the test is whether there is a moral duty to pay. Before such a sum can be recovered the plaintiff must show first that the services rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out-of-pocket expenses of the friend or friends who rendered these services are reasonable, bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted; and, thirdly, that the plaintiff undertakes to pay the sum awarded to the friend or friends. On the whole, after some doubt as to the second of these three conditions, I think the sum claimed does fulfil the three conditions. The special damage therefore will include the £110 claimed in respect of the expenses of Mr. and Mrs. Taylor and will amount in all to £244 15s. 0d.

The next problem arises from the element of shock. There were three factors which went to producing in the plaintiff the mental condition to which I have referred, which in turn produced the recurrent attacks of neuro-dermatitis. These factors were (1) the shock of the accident itself which resulted in the

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[4] (1948) 64 T.L.R. 269; [1948] 1 All E.R. 779.

[5] [1948] 1 All E.R. 779.

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physical injuries to the plaintiff; (2) the shock of discovering in hospital that her husband who had been with her had been killed by the same accident; (3) the continuing mental strain of having to adjust her life after her husband's death. I have no doubt that (1) is allowable; I have no doubt that (3) is not allowable, but what about (2)?

Mr. Myers says that this cannot be allowable as it was the result of what someone told her. It was not, says Mr. Myers, the accident itself since the plaintiff was rendered instantly unconscious and he referred to the well-known cases of *Hambrook* v. *Stokes Brothers*[6] and *Bourhill* v. *Young*.[7] Mr. Jukes, on the other hand, says that these cases have no application to the present case which concerns not whether there was a duty towards the plaintiff, but the consequences of an admitted breach of duty towards her, and referred to the equally well-known case of *In re Polemis and Furness Withy & Co. Ltd.*[8] The plaintiff in this case cannot rely on the duty of the defendant towards the plaintiff's husband, and one starts by considering what precisely was the duty of the defendant towards the plaintiff. The duty was to drive his motor-car with reasonable care. If at any moment he did not do so, there was a breach of that duty. If no damage ensued there was no cause of action since both breach and consequent damage must be present to establish a cause of action. Damage may consist of mental shock, which may be caused without any collision at all. Equally, a collision may result in mental shock without any physical injury. It cannot be doubted, and is not challenged by Mr. Myers, that if the plaintiff had not herself been injured but had seen her husband killed, the resultant shock would have been actionable. It would be a direct consequence of the defendant's negligent act. If the plaintiff had been conscious after the accident but had gained the first knowledge of her husband's death by someone screaming "Raphael is dead," and then seen that fact for herself, would liability depend on whether the hearing or the sight produced the shock? Would not each equally have been a direct and natural consequence of the negligent act? Approached in this way, it seems to me to follow that once a breach of duty is established the difference between seeing and hearing is immaterial. Hearing can be just as direct a consequence as seeing. The fact that, owing to unconsciousness in this case, a period of time elapsed before the news was heard, makes no difference provided that the news was a consequence which flowed directly from the breach of duty towards the plaintiff; any more than it makes any difference that an operation takes place after an interval of time. The fact that the defendant by his negligence caused the death of the plaintiff's husband does not give the plaintiff a cause of action for the shock caused to her; but the plaintiff, having a cause of action for the negligence of the defendant, may add the consequences of shock caused by hearing of her husband's death when estimating the amount recoverable on her cause of action.

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[6] [1925] 1 K.B. 141; 41 T.L.R. 125.

[7] [1943] A.C. 92; [1942] 2 All E.R. 396.

[8] [1921] 3 K.B. 560; 37 T.L.R. 940.

Mr. Jukes contended that this means that the plaintiff can recover in respect of her mental condition and neuro-dermatitis as it has gone on up to today on the ground that it is all part of the shock caused by her husband's death. I do not think that is so, although, of course, her husband's death has all the time played a part in that condition. Her mental condition and her neuro-dermatitis improved while she worked in the shop for her father-in-law and got worse after the shop was sold, caused, as I have said, by home difficulties. It is extremely difficult to divide up the consequences of the shock; one cannot hope to achieve more than a very rough and ready division, but I must do my best. In all, I award to the plaintiff the sum of £894 15s. To assist the parties, in case there is an appeal, that sum is made up as follows: special damage (to include the £110) £244 15s.; physical injuries £250; consequences of shock £400. If I had found against the plaintiff on the issue of shock from the knowledge of her husband's death, the £400 would have been £125. If I had found in the plaintiff's favour in respect of the whole of her mental condition and neuro-dermatitis to date, I should have increased the £400 to £850.

The second of these two actions is the action brought under the Fatal Accidents Acts and is a claim by the plaintiff on behalf of herself and the two children to whom I have referred.

I agree with Mr. Myers that the business carried on by the deceased husband was very much a family concern. There was no security of tenure with regard to the shop, which belonged to his mother. She charged him £5 a week, which at one period was reduced to half that sum and then was increased again some time later. In law he was merely a weekly tenant whose business could be closed at any moment by his mother. His father, as I have said, lost his Ministry of Food licence to trade during the war and spent at least part of each day, if not the whole, in assisting in his son's shop. For this he was paid no wages, but I have no doubt whatsoever that in practice he was paid partly by his taking such meat, chickens, etc., as he wanted at no cost, and partly by dipping his hand into the till from time to time to the knowledge of his son.

According to the accounts of the business prepared by the accountant the profits of the business averaged out at somewhere between £500 and £700 per annum. During the last 2½ years of Mr. Schneider's life they were £744 for the year to the end of November, 1953; £83 for the year to the end of November, 1954; and £390 for the half-year between November, 1954, and May, 1955. Mr. Myers says that these figures show that it was a dying business—it was not paying its way. I do not take that view. Before anyone can start business as a kosher butcher he has to obtain a licence from the Sheckita, which is the committee of the synagogue responsible for ritual killing. These licences are not given freely. Indeed, there are only three in Brighton and no new licences are granted unless an old licence has expired or is taken away, or the Jewish population increases to such an extent that another kosher butcher is necessary. Brighton not only has a largish Jewish population but has a number of hotels which are kosher, that is, where the proprietor undertakes that all his meat and poultry is bought from a kosher butcher. The prosperity of a kosher butcher in Brighton must depend to a considerable extent on the type of holiday season that Brighton itself has, but I can see no real reason why this business carried on in this family way should not have gone on being reasonably successful. I am quite certain that the accounts do not truly disclose the profit position. To some extent the father's family lived on the business as well as the son's family. The profits in the accounts are necessarily dependent upon how much is estimated for goods taken for the two families and the extent of the money taken out of the till.

I am quite satisfied that the plaintiff is an honest woman. I was very struck by the fact that when she was being cross-examined as to her injuries and counsel for the defendant suggested that her physical injuries must have cleared up in about six months she replied that that was too long a period, and she thought that all physical signs had disappeared within three or four months. The plaintiff tells me that week by week her husband brought her back £15 for housekeeping. Out of it she paid the household accounts so far as they were paid by cash, but the husband paid such accounts as were paid by cheque. She kept any housekeeping money left over at the end of the week. I do not think she knew how much her husband, or her husband's father, took out of the till. Indeed, apart, possibly, from the period when she was helping at the desk, she had no reason to know. My conclusion with regard to the business is that it was a business which at any rate permitted the husband to pay his wife £15 weekly for housekeeping and to draw for himself and his father sufficient money from the till to keep them both satisfied. I see no reason why, if the husband had not been killed, that situation should not have continued. Trade would, of course, have fluctuated, but I have no doubt that if trade had got really bad the mother would not have insisted upon the rent and the father (who had other means) would have drawn less or nothing. Of course, one cannot be certain about this and one must make allowance for the fact that it is possible that the business would have become unsuccessful and finally died out, but I think that that is unlikely since no competitors could start without a licence from the Sheckita.

The family appear to have lived reasonably well and I think I must take that into account when assessing the dependency. The husband would have had his share of the goods bought by the wife. On the other hand, I accept Mr. Juke's argument that I should deduct nothing for the keep of the plaintiff's mother since the plaintiff was allowed to keep the money left over from housekeeping and, therefore, in effect kept her mother. On the whole, I assess the dependency at the date of death at £600 per annum. I have then to decide the number of years to apply as the multiplier. Taking into account all the circumstances, I assess that factor at 12 and the result is that the dependency amounts to £7,200.

Mr. Myers submitted that from the sum awarded there must be deducted £549, since after the death of Mr. Schneider, his father took the business over, paying nothing for it, but discharging all the debts, and the debts exceeded the money due by £549, a sum which, says Mr. Myers, the plaintiff would have had to pay if the business had not been taken over. I do not think that that argument is a valid one. If one disregards the various factors which have to be disregarded in assessing an award under the Fatal Accidents Acts such as insurance, the estate was a bankrupt estate, although I hasten to add that it was not bankrupt when these factors are taken into consideration. I do not think any sum is deductible from the amount awarded unless there is a balance in favour of the estate after one has disregarded the factors which it is one's duty to disregard.

The only sum to be deducted from the £7,200 is the sum which has been paid in respect of damages due under the Law Reform Act, 1934. I understand that that sum amounts to £500 and I therefore give judgment for the sum of £6,700.

There will therefore be judgment for the plaintiff in her action for personal injuries for £894 15s. Mr. Jukes informs me that the defendant has paid £3,527 into court to the credit of both actions. That payment into court was made on March 19, 1959. The plaintiff will therefore have such of her costs as are attributable to her action for personal injuries up to that date; after that date the costs of that action must be the defendant's. The plaintiff will have judgment in her action under the Fatal Accidents Acts together with the costs of the consolidated action. I further direct that the £6,700 damages awarded under the Fatal Accidents Acts shall be apportioned so as to give £5,500 to the plaintiff and £600 to each of the two children. Those sums are to be paid into the Brighton District Registry and invested as the registrar shall think fit.

Judgment for the plaintiff with costs as above.

Solicitors: *F. H. Carpenter & Oldham, Brighton; Neil Maclean & Co.*

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Dec. 16, 21.

Lord Parker C.J., Hilbery, Cassels, Salmon and Edmund Davies JJ.

Dec. 18.

Hilbery, Gorman and Paull JJ.

Criminal Law—Fraud—Intent to defraud—Forgery—Uttering forged documents with intent to defraud—Whether economic loss necessary —Forgery Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *s.* 4 (1).

Criminal Law—Court of Criminal Appeal—Bail—Appeal dismissed—Fiat of Attorney-General applied for—Application for bail—Whether Court of Criminal Appeal has power to grant bail before fiat obtained—Whether an appeal "pending"—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *ss.* 14 (2), 21.

Words and Phrases—"Appellant"—"Pending"—Criminal Appeal Act, 1907, *s.* 21.

By section 4 of the Forgery Act, 1913: "(1) Forgery of any "document, which is not made felony under this or any other

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

"statute for the time being in force, if committed with intent to "defraud, shall be a misdemeanour . . ." By section 6: "(1) "Every person who utters any forged document . . . shall be guilty "of an offence of the like degree . . . and on conviction thereof shall "be liable to the same punishment as if he himself had forged the "document . . ."

The appellant was tried on an indictment which included two counts which charged him with uttering forged documents with intent to defraud, contrary to section 6 of the Forgery Act, 1913.[1] The appellant, as sales manager of Motors (Brighton) Ltd., had witnessed forged hire-purchase agreements on the strength of which certain finance companies had advanced large sums of money to Motors (Brighton) Ltd. The appellant's defence was that he had believed that the agreements were brought into being to enable the finance companies to lend money which they could not ordinarily do because of credit restrictions, and because by their memorandum and articles of association they could not act as moneylenders. He claimed that the purpose of the hire-purchase agreements was to make it appear that the finance companies were advancing money in the way of their business as finance companies, and he accordingly contended that he had had no intention to defraud the finance companies but was merely uttering the documents to mislead the relevant authority who might inspect the records to see that the credit restrictions were being observed and whose duty it was to prevent their contravention. The jury were directed that this was a sufficient intention to defraud and the appellant was convicted. He appealed on the ground that his intention was merely an intention to deceive and not an intention to defraud, which involved causing some economic loss to the person deceived:—

Held, that provided that the intention was to cause the person deceived to act to his real detriment, it mattered not that he suffered no economic loss. It was sufficient if the intention was to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived. Accordingly, the appeal was dismissed.

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[1] Forgery Act, 1913, s. 4: "(1) "Forgery of any document, which is "not made felony under this or any "other statute for the time being in "force, if committed with intent to "defraud, shall be a misdemeanour "and punishable with imprisonment "with or without hard labour for "any term not exceeding two years. "(2) Forgery of any public document "which is not made felony under "this or any other statute for the "time being in force, if committed "with intent to defraud or deceive, "shall be a misdemeanour and "punishable with imprisonment with "or without hard labour for any term "not exceeding two years."

S. 6: "(1) Every person who "utters any forged document . . . "shall be guilty of an offence of the "like degree . . . and on conviction "thereof, shall be liable to the same "punishment as if he himself had "forged the document . . . (2) A "person utters a forged document . . . "who, knowing the same to be forged, "and with either of the intents necessary to constitute the offence of "forging the said document . . . uses, "offers, publishes, delivers, disposes "of, . . . or puts off the said forged "document."

Rex v. *Bassey* (1931) 47 T.L.R. 222; 22 Cr.App.R. 160 and observations of Lord Tucker in *Board of Trade* v. *Owen* [1957] A.C. 602, 622 applied.

On the dismissal of his appeal the appellant applied for the fiat of the Attorney-General to take his case to the House of Lords. Before the Attorney-General had decided whether to grant his fiat or not, the appellant applied for bail to the Court of Criminal Appeal (post, p. 461):—

Held, that in such circumstances the court had the power to grant bail because there was an appeal pending within the meaning of section 14 (2) of the Criminal Appeal Act, 1907.[2]

Rex v. *Thompson* (1917) 33 T.L.R. 506; 12 Cr.App.R. 261 considered.

APPEAL against conviction.

The following statement of the facts is taken from the judgment of the court.

The appellant, Robert John Welham, was at all material times the sales manager of a company known as Motors (Brighton) Ltd., which carried on business in Brighton in motor-lorries. One Prater was a director and the secretary of the company. Prater was also a director and the secretary of a company known as Pacca Ltd., which carried on business in London in furniture. One Goodman was also a director of Pacca Ltd. In connection with the business of Pacca Ltd., Prater had dealings with two hire-purchase finance companies, Consortium Finance Ltd. and Masterton Finance and Trading Services Ltd. (hereinafter called the "finance companies"). Between May, 1956, and July, 1957, the finance companies advanced very large sums of money to Motors (Brighton) Ltd. and Pacca Ltd. on hire-purchase agreements and credit sales agreements which had been witnessed by either the appellant or Goodman and which, it was said, were forgeries.

The appellant, Prater and Goodman were all tried at the Central Criminal Court before the common serjeant on an indictment containing six counts charging conspiracy to defraud the finance companies, and also with uttering forged documents with intent to defraud. Goodman pleaded guilty to count 1, the conspiracy charge, and to counts 4, 5 and 6, charging him with uttering false documents with intent to defraud upon which Pacca Ltd. had obtained advances. Prater was found guilty on all counts and the appellant, though acquitted on count 1, was found

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[2] Criminal Appeal Act, 1907, s. 14 (2): "The Court of Criminal Appeal "may, if it seems fit, on the application of an appellant, admit the "appellant to bail pending the determination of his appeal."

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guilty on counts 2 and 3 charging him with uttering forged documents with intent to defraud, upon which Motors (Brighton) Ltd. had obtained advances. There was no evidence against him on counts 4, 5 and 6, and the jury were directed to, and did, acquit him on those counts. He was sentenced to nine months' imprisonment. By leave of the court he appealed against his conviction on counts 2 and 3.

C. W. G. Ross-Munro for the appellant. To support the conviction there must have been someone whom the appellant intended to defraud. On his own evidence there was an intention to mislead the relevant authority, which, in fact, was not the capital issues committee but the Board of Trade inspector. That, however, was not an intention to defraud but merely an intention to deceive, which is not sufficient. Section 4 (1) of the Forgeries Act, 1913, requires an intention to defraud. There is a clear distinction between uttering with intent to defraud and uttering with intent to deceive. The former is a crime, the latter is not. Buckley J. distinguished them in *In re London and Globe Finance Corporation Ltd.*,[3] and in Russell on Crime, 10th ed., pp. 1485–1486, and 11th ed., pp. 1428–1430, Buckley J.'s dictum is referred to and the author concludes that to defraud is to deprive by deceit and that there must be some economic loss caused. [Reference was also made to *Board of Trade* v. *Owen*[4] and *Reg.* v. *Wines*.[5]] In all the cases except *Rex* v. *Bassey*[6] there was the deprivation of something tangible. Services are not tangible. In *Reg.* v. *Wines*[7] the accused falsified accounts in order, he said, to avoid losing his employment and his wages. The wages were tangible.

[LORD PARKER C.J. Lord Tucker's remarks in *Board of Trade* v. *Owen*[8] are a paraphrase of what Swift J. said in *Bassey's* case.[9]]

In *Reg.* v. *Potter*[10] a fake document was put forward with the intention of inducing a county council to issue a driving licence. In the course of his judgment Paull J. said[11]: "It was to induce

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[3] [1903] 1 Ch. 728; 19 T.L.R. 314.

[4] [1957] A.C. 602; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411; 41 Cr.App.R. 11; sub nom. *Reg.* v. *Owen* [1957] 1 Q.B. 174; [1956] 3 W.L.R. 252, 739; [1956] 3 All E.R. 432.

[5] [1954] 1 W.L.R. 64; [1953] 2 All E.R. 1497; 37 Cr.App.R. 197.

[6] (1931) 47 T.L.R. 222; 22 Cr. App.R. 160.

[7] [1954] 1 W.L.R. 64.

[8] [1957] A.C. 602, 622.

[9] 47 T.L.R. 222.

[10] [1958] 1 W.L.R. 638; [1958] 2 All E.R. 51; 42 Cr.App.R. 168.

[11] [1958] 1 W.L.R. 638, 643.

"the county council to take a course of action which they would "not otherwise have taken, and which it was not only their right "but their duty not to take if they had known the true facts. "Moreover, if one may state another ground, it was obtained to "induce the county council to part with a chattel, namely, a "piece of paper (the driving licence) upon which there was a "certain printing and certain statements, and I cannot see why "that is not quite sufficient in order to form a basis for this "charge." Paull J. was right on the second ground of his judgment but wrong on the first. In *Rex* v. *Bassey* [12] the accused produced false documents to the Benchers of the Inner Temple in order to obtain admission as a student to the Inn. Swift J. held that that was done with intent to defraud because the Benchers had been induced to act to their injury by admitting a student whom they would have had a duty to exclude if they had known the true facts. That case is inconsistent with the authorities because there was no economic loss—the Benchers were not deprived of anything. Glanville Williams, at p. 77 of his Criminal Law, disagrees with that decision.

In the present case to hold the appellant guilty of an intent to defraud would be an extension of the law, because the only thing that the relevant authority was deprived of was an opportunity to prosecute. The Common Serjeant's direction goes much further than any other case. In *Reg.* v. *Hodgson* [13] the appellant was convicted on an indictment for forging and uttering a diploma of the College of Surgeons; he had used the diploma in his endeavours to get an appointment at a poor-house. Jervis C.J. held that the conviction was wrong because no intent to defraud had been shown. *Hodgson's* case [14] was not referred to in *Rex* v. *Bassey*.[15] In *Reg.* v. *Toshack* [16] the defendant had uttered forged documents with intent to induce the Corporation of Trinity House to give him a master's certificate; in that case it could be said that the examiners were deprived of a certificate to the value of 1d.; the case was referred to in *Reg.* v. *Hodgson*.[17]

Sir Jocelyn Simon Q.C., S.-G., J. H. Buzzard and *M. D. L. Worsley* for the Crown. The authorities establish that an accused is guilty of an intent to defraud if he contemplates that his deceit may cause some other person to act in a way in which he would not otherwise have acted, or to refrain from acting in a way in which he would otherwise have acted, either to his own possible detriment or to that of some third person or body of persons; and this includes the community generally, at any rate when the person deceived owes a duty to the community. The point of substance in this appeal is whether or not the statements were honestly made: *Rex* v. *Kritz.*[18] None of the authorities is inconsistent.

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[12] 47 T.L.R. 222.

[13] (1856) Dears. & B. 3.

[14] Ibid.

[15] 47 T.L.R. 222.

[16] (1849) 4 Cox C.C. 38; T. & M. 207.

[17] Dears. & B. 3.

In the report of *Reg.* v. *Toshack*[19] in Temple & Mews' Reports the case was not put as the defrauding of the examiners of certificates worth 1d. each; it was put as deceiving to the injury of the Corporation of Trinity House and the public at large: the judgment in that case is therefore support for the decision in *Rex* v. *Bassey.*[20] *Reg.* v. *Hodgson*[21] is of assistance for three reasons. First, there is the citation[22] of an old edition of Russell on Crimes and Misdemeanours where the definition of forgery is said to be "the fraudulent making or alteration of a "writing to the prejudice of another man's right." Then Erle J., in argument, referred to *Toshack's* case[23] and said[24]: "this "seems very analogous to forging the certificate in that case." Finally, the ratio decidendi of Jervis C.J.'s judgment was that there was no intent to defraud at the time of the instrument being forged, and that there was no uttering at the time when it was said that there was an intention to defraud. In *Reg.* v. *Moah*[25] the prisoner forged a testimonial with the intent to obtain a situation as a police constable. There was no financial detriment to the chief constable who was deceived, the detriment was to the person who paid the wages or, ultimately, the ratepayers. *Moah's* case[25] falls into line with *Reg.* v. *Toshack*[26] and *Rex* v. *Bassey.*[27]

[HILBERY J. Can we regard these cases as a safe guide when we are considering the Forgery Act, 1913? In the old indictments a count for defrauding and deceiving was not bad for duplicity; but in the Act there is a clear distinction between deceit and defraud.]

The old cases can be relied upon if the Act of 1913 is declaratory of the common law. Buckley J.'s judgment in *In re London and Globe Finance Corporation Ltd.*[28] is support for my argument. It was approved in *Rex* v. *Bennett and Newton*[29] and *Kat* v. *Diment*.[30] The meaning of intent to defraud was examined in *Starey* v. *Chilworth Gunpowder Co.*,[31] which was a case falling within section 2 (1) of the Merchandise Marks Act, 1887. There was no question of any financial detriment in that case. Reliance is not placed on any of these cases under the Merchandise Marks Act; but in *Starey* v. *Chilworth Gunpowder Co.*,[31] Byrne J. cites in full the dictum of Buckley J. in *In re London and Globe Finance Corporation Ltd.*[32] As to how far the old cases can be relied upon when the Act of 1913 makes a clear distinction between defraud and deceive, the necessary intent at common law was an intent to defraud; Stephen's History of the Criminal Law, vol. III, p. 186, says that the accepted definition of forgery at common law was making a false document with intent to defraud.

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[18] [1950] 1 K.B. 82; 65 T.L.R. 505; [1949] 2 All E.R. 406; 33 Cr. App.R. 169.

[19] 4 Cox C.C. 38.

[20] 47 T.L.R. 222.

[21] Dears. & B. 3.

[22] Ibid. 4.

[23] 4 Cox C.C. 38.

[24] Dears. & B. 3, 5.

[25] (1858) Dears. & B. 550.

[26] 4 Cox C.C. 38.

[27] 47 T.L.R. 222.

[28] [1903] 1 Ch. 728.

[LORD PARKER C.J. He goes on to say that the meaning of the phrase would be more exactly though less neatly expressed if it was with intent to deceive in such a manner as to expose any person to loss or the risk of loss.]

In other words it went beyond the deceit. Forgery is discussed in Bacon's Abridgment, 1832 ed., vol. III, p. 746. There it is said, "if by the circumstances of the case it should any way "appear to have been done with any eye of gaining an advantage "to the party himself, or of prejudicing a third person." Prejudicing a third person does not necessarily mean that there must be an economic deprivation. The cases show clearly that something more was needed than an attempt to deceive. What was needed was an act at any rate to the prejudice of any person who might be deceived. [*Reg.* v. *Marcus*[33] and *Reg.* v. *Nash*[34] were also referred to.] In *Reg.* v. *Hoatson*,[35] Rolfe B. uses the word damnified rather than deprived, and refers to a legal right of voting at a shareholders' meeting, which is only very remotely depriving someone of a tangible asset and in no real sense depriving him of an economic benefit. If it is correct to say that it was a necessary ingredient of the common law offence of forgery to prove an intent to defraud, it means that cases like *Toshack*[36] and *Moah*[37] are of value in building a line of authority through *Bassey's* case [38] to *Owen's* case [39] and on to *Potter's* case.[40] *Rex* v. *Bassey* [41] was cited with approval in *Owen's* case,[42] although clearly the approval was obiter. *Reg.* v. *Wines* [43] was put on the ground of economic detriment, but if my proposition is right the economic would be included in the general detriment.

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[29] (1913) 9 Cr.App.R. 146.

[30] [1951] 1 K.B. 34; 66 T.L.R. (Pt. 2) 474; [1950] 2 All E.R. 657.

[31] (1889) 24 Q.B.D. 90; 6 T.L.R. 95.

[32] [1903] 1 Ch. 728.

[33] (1846) 2 C. & K. 356.

[34] (1852) 2 Den. 493.

[35] (1847) 2 C. & K. 777.

[36] 4 Cox C.C. 38.

[37] Dears. & B. 550.

[LORD PARKER C.J. As a member of that court I should say that we did deliberately put it on that basis.]

Rex v. *Bassey* [44] was approved in *Reg.* v. *Fowler.*[45] In *Owen's* case [46] Donovan J., in summing up, said [47]: "was that "done with intent to defraud, that is to say, dishonestly to "induce someone into doing something which he otherwise would "not have done, that is if he had known the truth?" That goes much further than the submission for the Crown here.

[HILBERY J. I find difficulty here in understanding why the Board of Trade were damnified because they were prevented from carrying out a duty. They are no worse off; the community is worse off.]

One should look through them to the people who would be ultimately damnified. In that sense the Trinity House Brethren were damnified; the Benchers of the Inner Temple were damnified; those charged with export control in Germany were damnified because they were prevented from doing their duty. It is conceded that it may be necessary to show that they owe that general duty to the community or to some particular class of the community.

In *Owen's* case Lord Goddard C.J. said [48]: "It may well be "doubted whether a government department can be said to act "to its injury merely by issuing a certificate which it would not "have granted had the true facts been known. Certainly it has "not been deprived of anything. It is, however, unnecessary to "decide this point." In that case in the House of Lords, Lord Tucker dealt specifically with this matter and said [49]: "If, how"ever, a conspiracy of this nature is aptly included in the wide "category of conspiracies known as conspiracies to cheat and "defraud and if it is necessary to aver and prove that the acts "designed to be done or the object to be achieved will result in

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[38] 47 T.L.R. 222.

[39] [1957] A.C. 602.

[40] [1958] 1 W.L.R. 638.

[41] 47 T.L.R. 222.

[42] [1957] A.C. 602.

[43] [1954] 1 W.L.R. 64.

[44] 47 T.L.R. 222.

[45] [1956] Crim.L.R. 330.

[46] [1957] A.C. 602.

[47] Donovan J.'s summing-up is unreported.

[48] [1957] 1 Q.B. 174, 187.

[49] [1957] A.C. 602, 622.

"some person acting to his detriment, I feel little doubt that a "government department so acts if it issues a licence which "enables something to be done which the department is charged "with the duty to prevent." That fits in with the cases of *Toshack*,[50] *Moah*,[51] *In re London and Globe Finance Corporation*[52] and *Bassey*.[53] In *Reg.* v. *Potter*,[54] there are two reasons for Paull J.'s decision. The second reason introduces an element of artificiality into the law which is neither desirable nor necessary. Turner is a living author. In older editions of Russell on Crime and Kenny's Outlines of Criminal Law, there is no suggestion that there is the necessity of economic loss. Glanville Williams is again a living writer, who purports to do little more than quote Turner, and he nowhere cites *Toshack's* case.[55] [Reference was also made to Halsbury's Laws of England, 3rd ed., vol. 10, p. 871.] Stephen's History of the Criminal Law, vol. 2, p. 121, puts it as an injury which would certainly extend to the infringement of a right and not necessarily merely an economic detriment.

If it is necessary to prove an economic loss or an economic advantage to the deceiver, that is established in any event in this case. By causing the Board of Trade to refrain from prosecuting the appellant was continuing to enjoy illegal credit. There was a tangible advantage to the deceiver. Even if it is a question of deprivation, that is established here; the shareholders in the finance companies suffered a deprivation because the object of the deceit was to get a loan which was ultra vires the articles of association. It is unnecessary to prove a financial detriment. The fact that the shareholders were placed at risk is enough if it is necessary to prove detriment generally.

In any case the enjoying of illicit credit in conditions which were obtaining at the time does involve a contribution towards inflation whereby everybody in the community, and some section of the community particularly, suffer a direct economic detriment. Those arguments are put so that they may remain open; but the authorities clearly demonstrate that it is sufficient if a right is infringed. It is not necessary to show an economic deprivation.

Ross-Munro in reply. There is a complete distinction between the facts in *Owen's* case[56] and those on this appeal. To deprive of the opportunity of prosecuting is quite a different thing from depriving a government department of a licence which is of some value. On the facts here the appellant did not induce the inspector of the Board of Trade to do anything which it was his duty to prevent. What is said is that the appellant deprived him of the opportunity to prosecute. The inspector certainly had a duty to consider whether to prosecute, but there was no depriving him of something which it was his duty not to give to the appellant. In *Owen's* case [57] what Lord Tucker was saying was that a government department's duty was not to issue licences to the accused and that by those forged documents they persuaded the government department to do so. Therefore, it was inducing the government department to act to its detriment by issuing the licence. The facts of the present case go further than that. Here it is merely said that what happened was that there was a possibility, at the time the documents were uttered, that the intention of the appellant was to deprive the inspector of the opportunity of prosecuting. The Board of Trade was not deprived of anything nor did it act to its injury. In *Toshack's* case [58] the accused was not represented. No argument was put that there was a difference between intent to deceive and intent to defraud. It is conceded that though there was a certificate worth a penny, which in fact the man by his deceit obtained, the court did not decide on that ground. But it was said that Trinity House granted the accused their fiat for acting as a master; by the deceit Trinity House were deprived of that fiat, and thus they acted to their injury. In *Moah's* case,[59] the intention behind the forgery was to secure the post of constable, and in that post the accused would have received wages; thus the intention was not only to deceive but to defraud, because it was defrauding the people who would have paid the wages. In *Rex* v. *Bennett and Newton*,[60] the victim clearly acted to his injury. *Reg.* v. *Marcus* [61] takes the matter no further; it is authority for the proposition that a jury can only convict somebody of uttering a forged document with intent to defraud if in fact it is possible to defraud someone. In *Reg.* v. *Nash* [62] money for the shares was obtained by the person who uttered the false documents, which is a perfectly clear deprivation. *Rex* v. *Bassey* [63] was wrongly decided.

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[50] 4 Cox C.C. 38.
[51] Dears. & B. 550.
[52] [1903] 1 Ch. 728.
[53] 47 T.L.R. 222.
[54] [1958] 1 W.L.R. 638.
[55] 4 Cox C.C. 38.
[56] [1957] A.C. 602.

December 16. LORD PARKER C.J. This court is of the opinion that this appeal must be dismissed. The court will give its reasons for dismissing the appeal at a later date.

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[57] [1957] A.C. 602.
[58] 4 Cox C.C. 38.
[59] Dears. & B. 550.
[60] 9 Cr.App.R. 146.
[61] 2 C. & K. 356.
[62] 2 Den. 493.
[63] 47 T.L.R. 222.

[On December 18 the appellant, having applied for the fiat of the Attorney-General to appeal to the House of Lords, was granted bail by the Court of Criminal Appeal (Hilbery, Gorman and Paull JJ.) for the reasons stated, post, p. 461.]

December 21. HILBERY J. read the following judgment of the court, in which he stated the facts, and continued: The appellant's defence was that there was no intent to defraud the finance companies. He said that Prater had told him that the finance companies had money lying idle which they were anxious to lend; that they could not do so because of the current credit restrictions; but that they were prepared to do so if they could have documents which would make it appear to anyone inspecting their records that they were advancing money in the way of their business as finance companies. Prater, he said, had informed him that this was further necessary because under their memorandum and articles the finance companies could not act as moneylenders. The appellant said that he believed Prater and, accordingly, that he had no intention to defraud the finance companies but was merely uttering forged documents in order, as it was said, to pull wool over the eyes of anyone who might inspect the records of the companies in order to see that the credit restrictions were being observed.

The Common Serjeant thereupon properly directed the jury that if they thought that the appellant's story might well be true, they should acquit him on count 1, since the conspiracy alleged was a conspiracy to defraud the finance companies and no one else. The jury, as already indicated, apparently took this view and acquitted the appellant on count 1.

The Common Serjeant went on to say to the jury that the matter did not end there, since under counts 2 and 3 it was not necessary to allege an intent to defraud any particular person, and they did not do so. He directed the jury that if they were satisfied that the appellant knew that the documents, the subject of these counts, were false, then on his own story he was guilty of the offences alleged in those counts. Thus, in summing up, he said: "It is not incumbent upon the prosecution in these two "counts, as it is in the case of the first count, to prove an intent "to defraud any particular person, and, therefore, if the prosecution have succeeded in proving against Welham that he was a "party to putting forward documents which he knew to be forged, "and he put them forward with the dishonest intention, as he "himself said, of defrauding the capital issues committee, well, "then he would be guilty upon these two counts." Again he said: "They (the prosecution) have got to prove an intent to "defraud, and Welham's own case is that the intention here in "respect of these bogus documents was to defraud the capital "issues committee by deceiving them in not preventing some-"thing which it was their duty in law to prevent, namely, the "advancing of large sums of money over a certain limit which "was provided by law at the time." Finally, after the jury had retired, and had returned into court to put a question, the Common Serjeant gave them a further direction to the same effect.

It is true that the appellant's story was that he thought he was being a party to deceiving the capital issues committee, whereas the person who might inspect the companies' books would be an inspector of the Board of Trade, but provided that there was an intent to defraud someone, it matters not who would be defrauded.

It was in these circumstances that the jury returned a verdict of guilty on counts 2 and 3, and the sole question in this appeal is whether the Common Serjeant's direction was right in law in saying that the appellant's story amounted to an admission of an intent to defraud. If it amounted merely to an intention to deceive, then the direction was wrong.

The classic definition of intent to defraud is that laid down by Buckley J. in *In re London and Globe Finance Corporation Ltd.*[1] There he said[2]: "To deceive is, I apprehend, to induce a "man to believe that a thing is true which is false, and which the "person practising the deceit knows or believes to be false. To "defraud is to deprive by deceit: it is by deceit to induce a man "to act to his injury. More tersely it may be put, that to deceive "is by falsehood to induce a state of mind; to defraud is by deceit "to induce a course of action."

That passage has been quoted and approved many times by this court. No doubt the last sentence beginning with the words "more tersely it may be put" must be read with reference to what has gone before and was not intended to enlarge the definition. The course of action induced by deceit must clearly be a course of action which involves some real deprivation or injury. But it is said here that the true definition, and that intended to be laid down by this passage, ends with the words: "To defraud is to deprive by deceit." It is said that the essential element in an intent to defraud is an intent to deprive the person deceived of something of value, whether money or a chattel, and thus the causing of some economic loss. This view is well stated by the editor of the 11th edition of Russell on Crime at pp. 1428–1430, and is adopted by Professor Glanville Williams in his Criminal Law at pp. 76–77.

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[1] [1903] 1 Ch. 728; 19 T.L.R. 314.

[2] [1903] 1 Ch. 728, 732.

We have, however, come to the conclusion that this is too narrow a view. While, no doubt, in most cases of an intention to defraud the intention is to cause an economic loss, there is no reason to introduce any such limitation. Provided that the intention is to cause the person deceived to act to his real detriment, it matters not that he suffers no economic loss. It is sufficient if the intention is to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived. Moreover, to hold otherwise would, we think, involve holding that at least one case, *Rex* v. *Bassey*,[3] was wrongly decided, and that the observations of Lord Tucker in his speech in the House of Lords in *Board of Trade* v. *Owen*[4] were misconceived.

Thus, in *Bassey's* case[5] the appellant had produced false documents to the Benchers of the Inner Temple in order to obtain his admission as a student to the Inn. It was argued that at most he intended to deceive, and that the Benchers by admitting him were not being deprived of anything. Swift J., however, in giving the judgment of the court, said[6]: "In this case there was, in "the opinion of this court, evidence on which the jury might "properly say that, in making these forged documents and in "subsequently uttering them, the appellant intended to defraud, "because he intended to induce the Benchers to act to their "injury in admitting as a student a person whom, if they had "known the true facts, it was not only their right, but also their "duty, to exclude." There was thus no question of the Benchers being deprived of anything which involved economic loss, and if the present appellant's argument is right, that case was wrongly decided.

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[3] (1931) 47 T.L.R. 222; 22 Cr.App.R. 160.

[4] [1957] A.C. 602; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411; 41 Cr.App.R. 11; sub nom. *Reg.* v. *Owen* [1957] 1 Q.B. 174; [1956] 3 W.L.R. 252, 739; [1956] 3 All E.R. 432.

[5] 22 Cr.App.R. 160.

[6] Ibid. 162.

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In *Board of Trade* v. *Owen*[7] the point decided was that no indictment for conspiracy to obtain a lawful result by unlawful means would lie in England, where the unlawful means and the ultimate object were both outside the jurisdiction. Count 3, however, charged the defendants with conspiracy to defraud a government department in Germany by causing that department to grant export licences. In dealing with that matter, Lord Goddard in this court, after referring to Buckley J.'s definition, said[8]: "It may well be doubted whether a government "department can be said to act to its injury merely by issuing a "certificate which it would not have granted had the true facts "been known. Certainly it has not been deprived of anything. "It is, however, unnecessary to decide this point because of the "view the court has formed on the main question raised by the "certificate of appeal granted by the judge." On appeal, however, to the House of Lords, *Bassey's* case[9] was relied on in argument and Lord Tucker said[10]: "If, however, a conspiracy "of this nature is aptly included in the wide category of con-"spiracies known as conspiracies to cheat and defraud and if it "is necessary to aver and prove that the acts designed to be "done or the object to be achieved will result in some person "acting to his detriment, I feel little doubt that a government "department so acts if it issues a licence which enables some-"thing to be done which the department is charged with the duty "to prevent." Both by his reasoning and by the very words he used, Lord Tucker in that passage is, we think, clearly giving tacit approval to the decision in *Bassey's* case.[11] It is true that this passage in Lord Tucker's speech can be said to be obiter, but it is to be observed that all their Lordships were content to approve what he said without qualification. It has been urged that Lord Tucker's observations can be justified on the ground that in that case the person deceived was induced to part with something, namely, the piece of paper by which the licence was granted, and that that licence was, at any rate, in the hands of the deceiver of economic value. Not only, however, was that not the ground on which Lord Tucker made his observations, but it would, in our opinion, have been a highly artificial ground. It would have been absurd if a different conclusion were necessitated had the licence granted been an oral licence.

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[7] [1957] A.C. 602.

[8] [1957] 1 Q.B. 174, 187.

[9] 47 T.L.R. 222.

[10] [1957] A.C. 602, 622.

[11] 47 T.L.R. 222.

Reference may also be made to *Reg.* v. *Potter*,[12] a decision of Paull J. on assize. False documents had, in that case, been put forward with the intention of inducing a county council to issue a driving licence. There the judge said [13]: "It was to induce the "county council to take a course of action which they would not "otherwise have taken and which it was not only their right but "their duty not to take if they had known the true facts." It is true that he went on to say that the intent to defraud could be justified on another ground, namely, an intention to cause the county council to part with a chattel, that is, the piece of paper on which the licence was printed, but, in our judgment, the first ground given by him was the correct one.

It is further to be observed that in the earlier editions of the textbooks no suggestion is to be found of the need for an economic loss. Thus, there is no suggestion of this in the earlier editions of Russell on Crime. In the 13th edition of Kenny on Outlines of the Criminal Law, the last edition by that author, it is specifically stated at p. 263 that pecuniary detriment is unnecessary. To the same effect is the 15th edition by Mr. Godfrey Phillips at pp. 301, 302. It is further to be observed that in Stephen's History of the Criminal Law, vol. 2, at p. 121, the following definition is given: "I shall not attempt to construct a "definition which will meet every case which might be suggested, "but there is little danger in saying that whenever the words "'fraud' or 'intent to defraud' or 'fraudulently' occur in the "definition of a crime two elements at least are essential to the "commission of the crime: namely, first, deceit or an intention "to deceive or in some cases mere secrecy; and, secondly, "either actual injury or possible injury or an intent to expose "some person either to actual injury or to a risk of possible injury "by means of that deceit or secrecy." There is no suggestion there that the injury must take the form of an economic loss. Moreover, as there stated, "a risk of possible injury" is enough.

This view is further supported by a reference to the old cases decided before forgery was made a statutory offence, since at common law forgery was the making of a false document with intent to defraud. Thus, in *Reg.* v. *Toshack* [14] the Court of Criminal Appeal decided that counts alleging that the defendant had uttered forged documents with intent to induce the Corporation of Trinity House to issue to him a master's certificate were good counts for forgery at common law. It is true that the indictment set out that the pieces of paper upon which certificates were granted were of the value of one penny each, but Alderson B., in delivering the judgment of the court, did not proceed upon that basis but on the following ground[15]: "It is a very important "public duty which the Trinity House have to discharge, "important to owners of property of this description, and important "to the lives of those entrusted to their care; and if insufficient "seamen or persons otherwise than of good character and "conduct are appointed, the unfortunate subordinates of the ship "are often subjected to harsh and improper treatment." It is further to be observed that Erle J. in *Reg.* v. *Hodgson*[16] read the judgment of Alderson B. in the same way. Thus, he said[17] (in reference to *Reg.* v. *Toshack*[18]): "This seems very analogous to "forging the certificate in that case. The prisoner used the "diploma in his endeavours to get appointed to the poor house. "If an incompetent man were appointed to such a situation, in "consequence of his appearing to have this qualification, a large "class of persons might suffer. I do not see any great distinc- "tion between the danger of loss of life at sea through the "employment of an incompetent pilot, and the danger of loss of "life on land through the employment of an incompetent "surgeon."

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[12] [1958] 1 W.L.R. 638; [1958] 2 All E.R. 51; 42 Cr.App.R. 168.

[13] [1958] 1 W.L.R. 638, 643.

[14] (1849) 4 Cox C.C. 38; T. & M. 207.

Perhaps the strongest argument in favour of the view that the intention must be an intention to cause some economic loss is that otherwise there is, for practical purposes, little distinction between an intent to defraud and an intent to deceive. Yet the Act of 1913 in subsections (1) and (2) of section 4 clearly draws such a distinction. While, however, there may be in practice few occasions when a false document is not uttered with intent to defraud, there may well be cases in which the only intent is an intent to deceive. *Hodgson's* case[19] is a good example of that. In that case the defendant had forged a diploma of the College of Surgeons and hung it up in his sitting-room. At the time when he did so he had no intent to cause anyone to act on it, but only to induce those who might come to his room to believe that it was genuine. In those circumstances it was held that there was no intent to defraud and, accordingly, the conviction for forgery was quashed.

Turning now to the facts of this case, the admitted intent of the appellant was by deceit to induce such person as was charged with the duty of seeing that the credit restrictions were observed to act in a way in which he would not act if he knew the true facts. This the appellant was doing in order that he might benefit by getting further loans. In the judgment of this court the appellant was intending by deceit to induce the person deceived to act to his detriment, and thus was intending to defraud. Indeed, on the facts of the present case, it could be said that the appellant was intending by deceit to deprive the person deceived of the opportunity of exercising a right, namely, a right to prosecute for breach of the credit restrictions, thus depriving the community of the protection afforded by them. Accordingly, this appeal is dismissed.

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[15] 4 Cox C.C. 38, 41.

[16] (1856) Dears. & B. 3.

[17] Ibid. 5.

[18] 4 Cox C.C. 38.

[19] Dears. & B. 3.

Appeal dismissed.

Application for bail.

The facts are fully stated in the judgment.

C. W. G. Ross-Munro for the applicant.

M. D. L. Worsley for the Crown.

In addition to the case referred to in the judgment, the following were cited in argument: *Millensted* v. *Grosvenor House (Park Lane) Ltd.*[1]; *Rex* v. *Ball*[2]; *Ex parte Blyth.*[3]

Hilbery J. delivered the following judgment of the court: Mr. Ross-Munro applies for bail on behalf of a prisoner named Robert John Welham, whose appeal against his conviction came before the full Court of Criminal Appeal on Wednesday, December 16, 1959. At the conclusion of the hearing on that day the court dismissed the appeal, stating that it would give its reasons for dismissing the appeal later. Mr. Ross-Munro then intimated to the court that his client would apply for the fiat of the Attorney-General, and, indeed, he informs us now that since Wednesday his client has so applied for leave to take that decision of the Court of Criminal Appeal to the House of Lords. Mr. Ross-Munro, in those circumstances, asks the court for bail for his client, who had been on bail pending the hearing of his appeal in the Court of Criminal Appeal. The court expressed some doubt as to whether it had jurisdiction to grant bail and, refusing bail for the time being, gave leave to renew the application for bail, and it is such renewed application for bail that Mr. Ross-Munro makes today.

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[1] [1937] 1 K.B. 717; 53 T.L.R. 406; [1937] 1 All E.R. 736.

[2] [1911] A.C. 47; 5 Cr.App.R. 238.

[3] [1944] 1 K.B. 532; 60 T.L.R. 353; sub nom. *Blyth* v. *Appeal Committee of Lancaster* [1944] 1 All E.R. 587.

The question which we have to decide, therefore, is whether this court in those circumstances has jurisdiction to grant bail. There is authority by a decision of this court in *Rex* v. *Thompson* [1] that where a prisoner who has appealed to the Court of Criminal Appeal obtains the fiat, the court has jurisdiction then to grant bail pending the hearing of the appeal by the House of Lords in respect of which the fiat has been granted. But the question that we have to determine is whether, while the application for the fiat is pending, the court has power to grant bail to the prisoner who is making that application for the fiat. By the Criminal Appeal Act, 1907, s. 14, which deals with the admission of appellants to bail, subsection (2) provides: "The "Court of Criminal Appeal may, if it seems fit, on the applica-"tion of an appellant, admit the appellant to bail pending the "determination of his appeal."

No difficulty arises in such circumstances as obtained in *Rex* v. *Thompson*,[2] to which I have referred, in applying that section, because when the fiat had been granted there clearly was an appeal pending in the House of Lords from the decision of the Court of Criminal Appeal, and pending in the House of Lords from the decision of the Court of Criminal Appeal by virtue of or under the Criminal Appeal Act, 1907. The question, therefore, narrows itself in the circumstances of the present case into whether, when an appellant's case in the Court of Criminal Appeal has been dismissed, and he expresses a wish to obtain the fiat of the Attorney-General in order that he may appeal to the House of Lords, he is in those circumstances an appellant and has an appeal pending. In those circumstances, one must look to see what is the definition of "appellant" given in the Criminal Appeal Act, 1907. In what is called the definition section, namely, section 21, which is one of those sections which does not define but says what is to be included in an expression used in the Act, "appellant includes a person who has "been convicted and desires to appeal under this Act." If we were to limit the right of an appellant whose appeal has been dismissed by the Court of Criminal Appeal to obtain bail during the period when he is applying for the fiat and the matter of granting the fiat is under consideration, if we were to say he was not within the definition of a person wishing to appeal, so that he becomes an appellant under the Act to whom bail may be granted, we should indeed be limiting the effect of that definition section. We should be saying that, in those circumstances, he is not an appellant until the fiat has been granted, and there is an appeal pending in the House of Lords. That would be treating the person as an appellant who has an appeal actually in being. It is not giving full effect to the words of the definition, which goes further than that, and says that a person is an appellant who desires to appeal under the Act.

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[1] 33 T.L.R. 506; 12 Cr.App.R. 261, 278.

[2] 33 T.L.R. 506.

The applicant in this case falls, in our view, within that definition because he is a person desiring to appeal under the Act by virtue of the provisions in the Act which give him a right to apply for the fiat, and, if he obtains the fiat, to have his case carried up to the House of Lords. The situation would, indeed, be strange if we had not this power. A man convicted and sentenced to a short term of imprisonment who was granted bail pending the hearing of his appeal in the Court of Criminal Appeal would, if it were otherwise than we are deciding, have no right to do anything except serve possibly the whole of his sentence in prison while the Attorney-General was considering the question of granting his fiat; because if the court dismissed his appeal, but said it would give its reasons for that dismissal later, the necessary delay in preparing those reasons might mean that a time had elapsed such that the man would have served his whole sentence before the fiat could be granted and his appeal taken to the House of Lords. It would be strange if those were the circumstances, since once the right to appeal to the House of Lords is given, the decision in *Thompson's* case [3] would apply and the court would have jurisdiction to grant bail. In the circumstances, we think we have the power, and this man should be granted bail in the same recognisances as he was under when his appeal to the Court of Criminal Appeal was pending and, as a matter of convenience, he can enter into those recognisances at Wandsworth prison. Those recognisances can be taken by the governor of the prison in which he is at present detained. Then he must surrender on notice to do so from the prosecution. If the fiat is not granted, of course, he will be sent notice to surrender to this court and he will have to surrender at the time and place designated in the notice given by this court. The sureties will be in the same amount, and if there is any change in the personnel of the sureties, they will have to be accepted by the police.

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[3] 33 T.L.R. 506.

Application granted.

Solicitors: *Bellamy, Bestford & Co.; Director of Public Prosecutions.*

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Dec. 21.

Hilbery, Cassels and Edmund Davies JJ.

REGINA *v.* PRATER.

Criminal Law — Evidence — Accomplice — Corroboration — Warning, whether necessary—Evidence of co-accused.

Criminal Law—Court of Criminal Appeal—Proviso to section 4 (1) *of Act—Failure to warn jury of need for corroboration—Accomplice—Co-defendant—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1), *proviso.*

The appellant was convicted at the Central Criminal Court on one count of conspiring to defraud and on five counts of uttering forged documents. He appealed against his conviction, one of the grounds of his appeal being that the evidence of his co-accused at the trial, Welham, who gave evidence on his own behalf, required to be corroborated, and that there should have been a warning given by the judge of the danger of convicting the appellant on the evidence of his co-accused:—

Held, dismissing the appeal, that although the authorities by no means pointed in the same direction in the case of evidence of a co-accused as distinguished from a Crown witness, in practice it was desirable that a warning should be given to the jury where a witness, whether he was a co-accused or a Crown witness, might have some purpose of his own to serve; however, if there was clear and convincing evidence to such an extent that the court was satisfied that no miscarriage of justice had arisen by reason of the omission of the warning, the court would not interfere.

Rex v. *Garland* (1943) 29 Cr.App.R. 46n. approved.

APPEAL against conviction.

The facts are fully stated in the judgment. The circumstances giving rise to the conviction and the appeal are stated in *Reg.* v. *Welham,* ante, p. 447.

W. R. Fitch for the appellant.
M. D. L. Worsley for the Crown.

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

In addition to the cases referred to in the judgment, the following were cited in argument: *Rex* v. *Smallman*[1]; *Rex* v. *Heathfield*[2]; *Rex* v. *Wallis*[3]; *Rex* v. *Ashdown*[4]; *Rex* v. *MacDonald*[5]; *Rex* v. *Dean*[6]; *Rex* v. *Martin*[7]; *Rex* v. *Meredith*[8]; *Reg.* v. *Eckersley.*[9]

EDMUND DAVIES J. delivered the following judgment of the court: The circumstances giving rise to the appeal now before this court by Prater have already been sufficiently summarised in the judgment of the court which has been delivered in the appeal of his co-accused, Welham.

Prater, it will be recalled, was convicted on one count of conspiracy and upon five counts of uttering forged documents. His counsel, whose industry is equalled only by the clarity and cogency of his submissions, has urged three matters before this court as being grounds upon which the conviction of Prater should be quashed.

He has said in the first place that Welham was an accomplice. Welham was called on his own behalf, and it is said that, although a co-accused and not a Crown witness, his evidence required to be corroborated, that there should have been a warning given by the Common Serjeant of the danger of acting upon his evidence. The second ground is that one of the Crown witnesses, Truman, was likewise an accomplice, and that again there should have been a warning given of the danger of acting upon his testimony unless corroborated. The third ground was that Welham and Truman could not corroborate each other.

As to the third ground, there has been no sort of contest; it is well established that fellow accomplices may not corroborate each other. In relation to the first matter, that Welham was called on his own behalf and was an accomplice, and that a warning should have been given of the danger of acting upon his uncorroborated evidence, the authorities by no means point in the same direction. Of the many cases referred to, mention may be made of the judgments delivered by Channell J. in *Rex* v. *Scott*,[10] by Lord Alverstone C.J. in *Rex* v. *Martin*,[11] and by this court recently in *Rex* v. *Barnes*[12] on the one hand; on the other hand, by Avory J. in *Rex* v. *Barrow*,[13] by Humphreys J. in *Rex* v. *Garland*,[14] and again by the last-named judge in *Rex* v. *Rudd*.[15]

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[1] (1914) 10 Cr.App.R. 1.

[2] (1923) 17 Cr.App.R. 80.

[3] (1922) 38 T.L.R. 724; 16 Cr.App.R. 171.

[4] (1916) 12 Cr.App.R. 34.

[5] (1928) 21 Cr.App.R. 33.

[6] (1924) 18 Cr.App.R. 21.

[7] (1934) 24 Cr.App.R. 177.

[8] (1943) 29 Cr.App.R. 40.

[9] The Times, June 18, 1953.

[10] (1909) 2 Cr.App.R. 215.

[11] (1910) 5 Cr.App.R. 4.

[12] 56 T.L.R. 379; [1940] 2 All E.R. 229; 27 Cr.App.R. 154.

For the purposes of this present appeal, this court is content to accept that whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve. It is, however, to be observed that in *Davies* v. *Director of Public Prosecutions*,[16] Lord Simonds, in enunciating his third proposition, deals with the matter in these terms[17]: "Where the judge fails to warn the jury in accordance with this "rule, the conviction will be quashed, even if in fact there be "ample corroboration of the evidence of the accomplice, unless "the appellate court can apply the proviso to section 4 (1) of "the Criminal Appeal Act, 1907. The rule, it will be observed, "applies only to witnesses for the prosecution."

In the circumstances of the present appeal it is sufficient for this court to express the view that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts, and in *Rex* v. *Garland*[18] Humphreys J. used words completely apposite to the present case, namely, that if there be evidence so clear and convincing that this court is satisfied that no miscarriage of justice has arisen by reason of the omission of a warning to the jury, it will not interfere. On those grounds, and bearing in mind also the proviso to section 4 (1) of the Act of 1907, this court sees no reason to disturb the finding of the jury in respect of the first ground relied on by counsel for the appellant. I should have said in dealing with the first ground that it is to be remembered that the appellant gave no evidence on his own behalf and none was called for him.

Truman was called as a witness for the prosecution, and a number of suggestions were made to him by counsel for the appellant which appear to have been wholly denied by Truman. This court has looked in vain at the transcript of the summing-up, and has listened in vain, with respect to Mr. Fitch, for any satisfactory indication that there was material upon which the Common Serjeant would have been justified in presenting Truman to the jury as being an accomplice. As my brother Hilbery said, it is easy to make suggestions to a witness. That is one thing. But more than that is required to clothe a witness for the Crown or any other witness with the garment of an accomplice. This court is unable, on the material before it, to hold that it is shown that any warning was in strict law or in prudence called for, for it is by no means satisfied that there was any material upon which Truman could properly be described as an accomplice or as having any purpose of his own to serve. Here, again, had the matter arisen, this court is satisfied that there was ample and overwhelming evidence of a compulsive character which would have required the court to hold that this conviction ought not to be quashed.

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[13] (1934) 24 Cr.App.R 141.

[14] (1943) 29 Cr.App.R. 46n.

[15] (1948) 64 T.L.R. 240; 32 Cr.App.R. 138.

[16] [1954] A.C. 378; [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507; sub nom. *Reg.* v. *Davies* [1954] 1 W.L.R. 214.

[17] [1954] A.C. 378, 399.

[18] 29 Cr.App.R. 46n.

For these reasons, shortly stated, this court is of the opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

HULTQUIST *v.* UNIVERSAL PATTERN AND PRECISION ENGINEERING CO. LTD.

[1958 H. No. 1288.]

C. A.
1960
March 31;
April 1.

Sellers, Ormerod and Upjohn L.JJ.

Damages—Personal injuries—Special damage—Award of lump sum disablement gratuity—Proportion which had "accrued" in respect of industrial injury benefit—Amount to be deducted from loss of earnings—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *ss.* 7, 12 (1) (2) (3) (4) (5) (6)*—Law Reform (Personal Injuries) Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1) (6) (*c*) *—National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations,* 1957 (*S.I.* 1957, *No.* 2074), *Sch.* 1, *Pt. II.*

Costs—Payment into court—Lesser sum awarded—Issue on which plaintiff succeeded—Contributory negligence contested—Whether plaintiff entitled to costs of contested issue—Exercise of discretion—R.S.C., Ord. 22, *r.* 6.

The plaintiff, a machine operator, was injured owing to breach by his employers of their duty under section 14 (1) of the Factories Act, 1937. Thirteen weeks after the injury, the degree of his disability was assessed, under section 12 of the National Insurance

(Industrial Injuries) Act, 1946,[1] and the regulations made thereunder, at 14 per cent. "for life," and he received a lump sum gratuity of £210. He was then aged 36 and his expectation of life was agreed at 35 years.

In an action by the plaintiff against his employers the judge awarded him £550 as general damages; but he deducted from the agreed special damage, on his construction of section 2 (1) of the Law Reform (Personal Injuries) Act, 1948,[2] one-half of the lump sum disablement gratuity. Section 2 (6) [which provides that: "For the purposes of this section— . . . (c) an industrial "disablement gratuity shall be treated as benefit for the period "taken into account by the assessment of the extent of the disablement in respect of which it is payable"] was not cited nor referred to by the judge. On appeal by the plaintiff:—

Held, that on the true construction of section 2 (6) (*c*) of the Act of 1948, read with section 12 of the Act of 1946, the amount of a disablement gratuity for life which the court had to take into account under section 2 (1) of the Act of 1948 as "the value of "any rights which have accrued or probably will accrue to" the injured person "therefrom in respect of industrial injury benefit ". . . for the five years beginning with the time when the cause "of action accrued . . ." was one-half of such proportion of the gratuity as the five-year period (or the unexpired portion of that period) bore to the injured person's expectation of life, or to any lesser period specified for the duration of the gratuity. Accordingly, on the agreed expectation of 35 years' life the deduction from the gratuity of £210 should be one-half of £30 (post, pp. 480, 482).

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[1] National Insurance (Industrial Injuries) Act, 1946, s. 12: "(4) The "period to be taken into account by "an assessment of the extent of a "claimant's disablement shall be the "period (beginning not earlier than "the end of the injury benefit period, "and limited by reference either to "the claimant's life or to a definite "date) during which the claimant has "suffered and may be expected to "continue to suffer from the relevant "loss of faculty: . . . (5) An assessment shall state the degree of "disablement in the form of a percentage and shall also specify the "period taken into account thereby "and, where that is limited by reference to a definite date, whether the "assessment is provisional or final: ". . . (6) Where the extent of the "disablement is assessed for the "period taken into account as "amounting to less than twenty "per cent., disablement benefit shall "be an industrial disablement "gratuity (in this Act referred to as "a 'disablement gratuity')—(*a*) of "an amount fixed, in accordance with "the length of the said period and "the degree of disablement, by a prescribed scale, . . . The scale "prescribed for the purposes of this "subsection shall be the same for all "persons . . ."

[2] Law Reform (Personal Injuries) Act, 1948, s. 2: "(1) In an action for "damages for personal injuries (including any such action arising out "of a contract), there shall in assessing those damages be taken into "account, against any loss of earnings or profits which has accrued or "probably will accrue to the injured "person from the injuries, one half "of the value of any rights which "have accrued or probably will accrue "to him therefrom in respect of "industrial injury benefit, industrial disablement benefit or sickness benefit for the five years "beginning with the time when the "cause of action accrued. . . . (6) "For the purposes of this section— ". . . (*c*) an industrial disablement "gratuity shall be treated as benefit "for the period taken into account "by the assessment of the extent of "the disablement in respect of which "it is payable."

Per Sellers and Ormerod L.JJ. When benefits have been assessed and are ascertainable the words "shall be taken into account" in section 2 (1) mean "shall be deducted"; and where the court has to assess the value of any rights which "probably will accrue" the court will take them into account by way of an estimated allowance (post, p. 480).

Per Upjohn L.J. Section 2 (1) does not require any exact calculation to be made, and where evidence is lacking the court will make a rough-and-ready assessment of the proper proportion of the gratuity to be taken into account (post, pp. 482, 483).

Perez v. *C.A.V. Ltd.* [1959] 1 W.L.R. 724; [1959] 2 All E.R. 414 approved.

Roberts v. *Naylor Brothers Ltd.* [1959] 1 W.L.R. 718; [1959] 2 All E.R. 409 overruled.

Decision of Finnemore J. reversed in part.

The employers had before trial paid into court under R.S.C., Ord. 22, r. 6,[3] a sum in excess of the total damages awarded by the judge. At the trial they admitted liability for breach of statutory duty but contested, unsuccessfully, the issue of contributory negligence. The plaintiff claimed, on the authority of the note to R.S.C., Ord. 22, r. 6, and the cases there cited (Annual Practice, 1960, at p. 535), that he was entitled to the costs of the issue on which he had succeeded. The judge awarded the employers their costs from the date of their payment in, but granted the plaintiff leave to appeal from that order.

Per curiam. The question whether a plaintiff who has recovered a sum less than that paid into court before trial is entitled to the costs of an issue on which he has succeeded is a matter wholly in the discretion of the trial judge. The cases cited in the note to R.S.C., Ord. 22, r. 6, are not authorities which require a judge to grant such costs, or which require the Court of Appeal to intervene if he fails to do so (post, pp. 481, 482).

APPEAL from Finnemore J.

A milling machine operator, Thomas Moffat Hultquist, then aged 36, sustained an accident at work on December 9, 1957, as a result of which the whole of the index finger of his right hand had to be amputated. The cosmetic result was excellent, and he was left with a reasonable though impaired grip. He was away from work for 13 weeks until March, 1958, when he went back to his skilled employment, suffering no loss of wages and still able to do his job.

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[3] R.S.C., Ord. 22, r. 6: "Except "in an action to which a defence of "tender before action is pleaded or in "which a plea under the Libel Acts, "1843 and 1845, has been filed, no "statement of the fact that money "has been paid into Court under the "preceding Rules of this Order shall "be inserted in the pleadings and "no communication of that fact shall "at the trial of any action be made "to the Judge or Jury until all questions of liability and amount of debt "or damages have been decided, but "the Judge shall, in exercising his "discretion as to costs, take into "account both the fact that money "has been paid into Court and the "amount of such payment."

His total loss of wages during the 13 weeks was £197 18s. 6d. He received for that period, under the provisions of the National Insurance (Industrial Injuries) Act, 1946, and the regulations made thereunder, £61 1s. 6d. industrial injury benefit; and as from March 16, 1958, a disablement gratuity of £210, that being a final assessment of 14 per cent. loss of faculty stated to be "for "life," calculated in accordance with the relevant provisions of Schedule 1, Part II, of the National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations, 1957 (S.I. 1957, No. 2074). His actuarial expectation of life was agreed at 35 years.

He brought an action against his employers, the Universal Pattern and Precision Engineering Co. Ltd., claiming damages for alleged negligence and breach of the statutory duty to fence the milling machine securely, as required by section 14 (1) of the Factories Act, 1937. His claim for special damages was agreed at £197 18s. 6d. for loss of wages. The employers denied negligence and breach of statutory duty, and alleged, alternatively, contributory negligence by the plaintiff. In September 1958, after medical reports had been agreed, they paid into court under R.S.C., Ord. 22, r. 6, the sum of £700.

At the trial before Finnemore J. at Lewes Assizes on March 16, 1959, the employers admitted liability for breach of statutory duty but contested the issue of contributory negligence. The trial judge held that the plaintiff had not been guilty of contributory negligence and awarded him £550 by way of general damages.

The judge then considered the question as to what deductions fell to be made from the special damages of £197 18s. 6d. under the Law Reform (Personal Injuries) Act, 1948, s. 2 (1). It was agreed that half of the accrued industrial injury benefit of £61 1s. 6d., namely, £30 10s. 9d., fell to be deducted under that subsection.

On the deduction to be made from the lump sum disablement gratuity of £210, the judge said that there had been conflicting decisions among judges of the Queen's Bench Division as to whether section 2 (1) of the Act of 1948 required the whole of that sum or only a certain proportion of it to be taken into account, but that he would follow his own earlier decision in an unreported case in 1958 (*Watkin* v. *C. A. Parsons & Co. Ltd.*[4]), that when a lump sum payment had been made within the five-year limit the whole of that sum should be taken into account as money due under a right which had accrued during the five years. He accordingly deducted half the lump sum gratuity of £210, namely, £105, thus reducing the special damages to £62 7s. 9d. That sum, together with the award of £550 general damages, produced an award of £612 7s. 9d. total damages for the plaintiff.

As the sum of £700 paid into court exceeded that award, counsel for the plaintiff submitted that the note to R.S.C., Ord. 22, r. 6, in the Annual Practice, 1960 (at p. 535),[5] and the authorities there cited, supported the submission that the plaintiff should have his costs down to the date of the payment in, and the subsequent costs on the issue of contributory negligence on which he had succeeded. For the defendants it was submitted that they should have the costs of the action since the date of payment in, "in the ordinary way," and that under R.S.C., Ord. 65, costs were always in the discretion of the court. Finnemore J. ordered that the plaintiff should have his costs up to the time of the payment in, and that the defendants should have their costs thereafter; but he granted leave to the plaintiff to appeal on that order, expressing the view that it was an important point. The plaintiff appealed (a) against the quantum of general damages awarded; (b) against the judge's application of section 2 (1) of the Act of 1948 to the lump sum disablement gratuity; and (c) against the order as to costs.

Rose Heilbron Q.C. and *John Stocker* for the plaintiff. The question as to what proportion of a lump sum gratuity should be deducted from the special damages under section 2 (1) of the Law Reform (Personal Injuries) Act, 1948, has been the subject of six conflicting decisions at first instance: in three—by Finnemore J. in *Watkin* v. *C. A. Parsons & Co. Ltd.*[6] which he followed in the present case, and by Paull J. in *Roberts* v. *Naylor Brothers Ltd.*,[7] in which it was held that where the gratuity had been paid within the five years from the date when the cause of action accrued, half the whole sum had to be deducted; and in three—by Stable J. in *Meagher* v. *Parnall (Jute) Ltd.*,[8] Ashworth J. in *de Ridder* v. *Ford Motor Co. Ltd.*[9] and Edmund Davies J. in *Perez* v. *C.A.V. Ltd.*[10]—it was held that the proper deduction was such proportion of one-half of a life disablement gratuity as the years unexpired of the five-year period bore to the plaintiff's expectation of life at that time. Edmund Davies J.[10] referred to this conflict of judicial opinion and said that he doubted whether the point had occurred to the draftsman of the Act of 1948; but it is submitted that subsection (6) (*c*) of section 2, which does not appear to have been cited to the judges, and is not referred to in any of the decisions on this point, shows that the draftsman did provide for the situation arising where the extent of the disablement is less than 20 per cent. and the injured person receives a lump sum instead of a pension for the period taken into account (in this case the period being "for life") in accordance with the provisions of the National Insurance (Industrial Injuries) Act, 1946, s. 12, and the regulations made thereunder—now the National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations, 1957 (S.I. 1957, No. 2074). The effect of subsection (6) (*c*) is that where the expectation of life has been ascertained, as in the present case, the deduction is to be made in accordance with the decision of Edmund Davies J.[10]; and on the facts of this case, where the expectation of life is agreed at 35 years and the period taken into account in the assessment is "for life," the proportion to be deducted is half of so much of the final payment for life as related to the period of five years from the date of the accident, that is, half of one-seventh of £210—£15.

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[4] (1958) unreported, January 15 (Newcastle Assizes).

[5] "If defendant in an action for "unliquidated damages denies liability but pays money into court, "and plaintiff proceeds with action, "there are two distinct issues "raised, namely, (*a*) whether the "defendant is under any liability to "the plaintiff, and (*b*) whether the "sum paid in is sufficient to cover "the liability, if any. If the plaintiff "succeeds in recovering from the "defendant an amount which carries "costs, even though it is less than "the sum paid into court, he succeeds "on the first of those issues, and is "entitled to the whole costs of the "action down to payment in, and the "subsequent costs of the issue on "which he has succeeded."

[6] (1958) unreported, January 15 (Newcastle Assizes).

[UPJOHN L.J. Section 2 (1) is ambiguous because it does not contemplate a capital payment; but the subsection which has apparently not been referred to at first instance says that the gratuity must be spread over the whole period taken into account.]

[Counsel was not required to argue further on this point.]

Fenton Atkinson Q.C. and *H. Tudor Evans* for the employers.

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[7] [1959] 1 W.L.R. 718; [1959] 2 All E.R. 409.

[8] (1958) unreported, March 3 (Bristol Assizes).

[9] (1958) unreported, October 3.

[10] [1959] 1 W.L.R. 724, 727; [1959] 2 All E.R. 414.

Though no judicial consideration has yet been given to subsection (6) (*c*), it is submitted that its terms, read in the light of the other relevant statutory provisions, produce a result different from any of the judicial interpretations hitherto placed on section 2 (1). An examination of the structure of benefits under the Act of 1946, s. 12, and the Third Schedule to that Act, setting out the rates of disablement pensions (now replaced by the Second Schedule to the National Insurance (No. 2) Act, 1957), shows that pensions are all calculated on the basis of seven years' purchase; and the lump sum disablement gratuities should similarly be related to a seven-years' purchase basis. In fixing these figures the legislature had no regard to the actuarial expectation of life of any particular claimant; that is emphasised by section 12 (6) of the Act of 1946, which provides that " The scale prescribed . . . shall " be the same for all persons," so that age does not matter.

[ORMEROD L.J. Then you say that although the gratuity is stated to be " for life," all that the claimant in fact gets is a gratuity for seven years.]

That is what section 2 (6) (*c*) of the Act of 1948 deals with. If seven years' purchase is the proper basis for the deduction under section 2 (1) the amount to be deducted from the gratuity will be larger than that contended for by the plaintiff. Section 2 (6) (*c*), applied to this case, says that " industrial disablement " gratuity " means under 20 per cent. disability, for which a lump sum is awarded, which lump sum is to be treated as " benefit," that is, a weekly payment " for the period taken into account by " the assessment," namely, " life," " of the extent of the dis- " ablement in respect of which it is payable." The result is, that an industrial benefit gratuity of £210 shall be treated as benefit for life at the rate appropriate to a disablement of 14 per cent. which produces 11s. 8d. a week—just over £30 a year. The figure for seven years' purchase being £210, the subsection requires that this man shall be treated as receiving benefit at 11s. 8d. a week for the whole period of assessment, so that he would receive £150 for the five years to be considered under subsection (1); and it is that figure which the court has to halve and deduct.

Even if that submission is not accepted, the conclusion of Edmund Davies J. in *Perez* v. *C.A.V. Ltd.*[10] that the value accruing to this plaintiff was only five years' proportion of the sum of £210 is not correct; for a cash payment of £210 at the beginning of the five-year period, if spent on an annuity, would bring in £65 over five years, and the court should then deduct half that sum under section 2 (1).

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[10] [1959] 1 W.L.R. 724, 727.

[SELLERS L.J. But what is the point of saying "for life" if it is only seven years? It seems odd that a man who gets a pension shall be treated as having to give credit only for what he receives in the five-year period, whereas the man who receives a lump sum for life has to give credit over the whole period of life.]

That is what the Act provides; and it keeps the balance between the man who gets a pension and the man who gets a lump sum gratuity.

[UPJOHN L.J. But that is what it does not do. The pension man gets his pension for life although it may be based on seven years' purchase, while the man with an under 20 per cent. disability is not getting that figure for life at all. All he gets is the capital sum; and it seems very hard if he is injured at the age of 35 and has to bring the same figure into account as a man of 65 with a much shorter expectation of life.]

Rose Heilbron Q.C. in reply. The Ministry, in setting out the scale of benefits, used a convenient method of calculation, namely, the seven-years' purchase basis; but the benefit itself is not for seven years but for life. The fact that section 12 (5) of the Act of 1946 provides for a gratuity to be paid in instalments in certain circumstances indicates that it is meant to cover the whole period of life. The alternative submission for the defendant employers seeks to put something into the section which is not there, namely, that the claimant has to increase the amount received by buying an annuity, and that that is the sum to be taken into account. But nothing in the Act states that the workman has to do something with the money, and where such small amounts are in question such a refinement should not be read into the section. An indication that that could not have been intended is that annuities are not granted under £19 a year, so that where a gratuity is less than £150 it would not be possible to purchase an annuity.

If the construction contended for on behalf of the plaintiff is wrong and the question of costs arises, it is submitted that as the issue of contributory negligence was fought by the defendants and won by the plaintiff, he should have his costs of that issue. [*Gray* v. *Jones* [11]; *Fitzgerald* v. *Thos. Tilling Ltd.*[12]; *Powell* v. *Vickers, Sons & Maxim Ltd.*[13] and *Wagstaffe* v. *Bentley* [14] were referred to.] In *Findlay* v. *Railway Executive*,[15] a more recent decision, Somervell L.J. and Denning L.J. said[16] that there might be cases which entitled a judge to make another order; and support for this submission is to be found in the note to R.S.C., Ord. 22, r. 6, in the Annual Practice, 1960, at p. 535.

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[11] 55 T.L.R. 437; [1939] 1 All E.R. 798.

[12] (1907) 96 L.T. 718, C.A.

[13] [1907] 1 K.B. 71; 23 T.L.R. 78, C.A.

[14] [1902] 1 K.B. 124, C.A.

Fenton Atkinson Q.C. in reply on the question of costs. Most of the cases cited were decided before 1933 when R.S.C., Ord. 22, r. 6, was altered so as to give the court a completely unfettered discretion which, combined with the provisions of R.S.C., Ord. 65, r. 1, makes the question of costs one entirely for the judge's discretion, and this court cannot interfere. [*Donald Campbell & Co.* v. *Pollak*[17] was referred to.] In this case the judge considered his own and supporting experience and decided that he would make the normal order; and as the plaintiff had refused to accept £700 and elected to fight, he should pay his costs from the date of payment in.

[SELLERS L.J. The payment in is to buy off the whole action.]

Cur. adv. vult.

SELLERS L.J. stated the facts set out above and said that on the first ground of appeal that the general damages of £550 should be substantially increased, the medical reports had been agreed, and the only task for the judge was to assess the appropriate damages. He had done so fairly and adequately, and his Lordship could see no reason for disturbing the assessment. His Lordship continued: The second ground of appeal is more involved and raises, for the first time in this court, a question on which there has been a conflict of judicial opinion; Finnemore and Paull JJ. have taken one view, and Stable, Ashworth and Edmund Davies JJ. another. Mr. Atkinson has contended that neither view is correct and he has submitted an alternative.

The special damage claimed by the plaintiff was £197 18s. 6d. loss of wages, and this was an agreed sum, but from this sum certain deductions have to be made, and it is here that the controversy has arisen. While he was off work the plaintiff received industrial injury benefit amounting to £61 1s. 6d., and at the end of that period of benefit he was awarded an industrial disablement gratuity of £210. The extent of disablement resulting from the loss of faculty was assessed at 14 per cent. for the period from March 16, 1958, for life. It was a final assessment.

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[15] [1950] W.N. 570; 66 T.L.R. (Pt. 2) 836; [1950] 2 All E.R. 969, C.A.

[16] 66 T.L.R. (Pt. 2) 836, 839, 841–842.

[17] [1927] A.C. 732, 812; 43 T.L.R. 787, H.L.

The deductions arise under the Law Reform (Personal Injuries) Act, 1948, from which I cite the relevant provisions. [His Lordship read section 2 (1) and continued:] No difficulty arises in respect of the accrued injury benefit of £61 1s. 6d. It was accepted that credit should be given for half of that, namely, £30 10s. 9d. With regard to the disablement gratuity Finnemore J. has treated that as received and accruing within five years of the accident, and has allowed half of £210, namely, £105, to be credited against the loss of wages, making a total of £135 10s. 9d., and so reducing the special damage to £62 7s. 9d.

The appellant submitted that it is erroneous on the facts of this case to take into account half of the gratuity of £210 because this sum was not an industrial disablement benefit for the five years beginning with the time when the cause of action occurred, but was a gratuity for life. The expectation of life of the appellant was agreed at 35 years and, therefore, the portion of the gratuity to be attributed to the first five years was one-seventh of £210, namely, £30, and the appropriate credit was half of that, namely, £15. The two credits together on this basis would amount to £45 10s. 9d. which, deducted from the loss of wages of £197 18s. 6d., would give special damages of £152 7s. 9d., making the total damages £702 7s. 9d. As £700 had been paid into court this became a vital figure on the question of costs.

In arriving at his decision Finnemore J. followed his own judgment in *Watkin* v. *C. A. Parsons & Co. Ltd.*,[1] and after considering a judgment to the contrary of Stable J. in *Meagher* v. *Parnall (Jute) Ltd.*[2] These two cases were considered and extracts were cited from them in *Roberts* v. *Naylor Brothers Ltd.*,[3] where Paull J. took the same view as Finnemore J., and also in the next case in the same reports, *Perez* v. *C.A.V. Ltd.*,[4] where Edmund Davies J. held, agreeing substantially with the unreported decision of Stable J., that the proper deduction under section 2 (1) from a plaintiff's loss of earnings to be made in assessing his special damage was such proportion of one-half of a life disablement gratuity as the years unexpired of the five-year period bore to the plaintiff's expectation of life at that time.

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[1] (1958) unreported, January 15.

[2] (1958) unreported, March 3 (Bristol Assizes).

[3] [1959] 1 W.L.R. 718, 721; [1959] 2 All E.R. 409.

[4] [1959] 1 W.L.R. 724; [1959] 2 All E.R. 414.

In another unreported case, *de Ridder* v. *Ford Motor Co. Ltd.*,[5] Ashworth J. took the same view as Stable and Edmund Davies JJ., and held that " for " in the phrase " for the five years " does not indicate that all money received in the period of five years has to be deducted in the proportion of one-half, but that the court is faced with the task of assessing the benefit attributable to the loss during that period.

The vexed question which brought about this difference of opinion was thought by at least some of the judges mentioned to have been a difficulty which had not occurred to the draftsman of the Act of 1948. But, although it does not appear to have been referred to in the argument of counsel, or in any of the several judgments delivered on this point, section 2 (6) (*c*) of the Act in question provides that for the purpose of section 2 " an industrial " disablement gratuity shall be treated as benefit for the period " taken into account by the assessment of the extent of the " disablement in respect of which it is payable." By this provision, as I read it, the draftsman had anticipated and had provided for the uncertainty which the earlier part of the same section, that is, subsection (1), might contain. If this provision had been read there might well have been unanimity among the judges and agreement with the view expressed by Edmund Davies J. in the only reported case to this effect.[6]

Mr. Atkinson, while recognising the applicability of section 2 (6) (*c*), submitted that to interpret it correctly one had to consider the structure of the provision of these benefits and payments; and the effect was, he alleged, that the benefit all accrued within seven years, and this worked out at 11s. 8d. a week or £30 odd a year, and therefore, for the five-year period, the total benefit of the gratuity would be £150, and half of that would give a credit of £75.

In order to follow this argument it is necessary to refer in some detail to the provisions made for compensating persons disabled in industry in substitution for the benefit of the Workmen's Compensation Acts.

The National Insurance (Industrial Injuries) Act, 1946, provided a system of insurance against personal injury caused by accident arising out of and in the course of a person's employment. By section 7 provision is made (inter alia) for (a) industrial injury benefit and (b) industrial disablement benefit. Section 12 states the circumstances in which an insured person shall become entitled to disablement benefit. By subsection (2) the extent of disablement has to be assessed by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty in accordance with principles laid down in the subsection. Subsection (3) provides that regulations may be made for further defining the principles of assessment and for treating a loss of faculty as a prescribed degree of disablement. Subsection (4) reads, without the proviso: "The period to be taken "into account by an assessment of the extent of a claimant's "disablement shall be the period (beginning not earlier than the "end of the injury benefit period, and limited by reference either "to the claimant's life or to a definite date) during which the "claimant has suffered and may be expected to continue to suffer "from the relevant loss of faculty." Subsection (5) reads, without the proviso: "An assessment shall state the degree of "disablement in the form of a percentage and shall also specify "the period taken into account thereby and, where that is "limited by reference to a definite date, whether the assessment "is provisional or final." Subsection (6), of which I shall read only part, provides: "Where the extent of the disablement is "assessed for the period taken into account as amounting to less "than twenty per cent., disablement benefit shall be an industrial "disablement gratuity (in this Act referred to as a 'disablement "'gratuity')—(*a*) of an amount fixed, in accordance with the "length of the said period and the degree of disablement, by a "prescribed scale, but not in any case exceeding one hundred and "fifty pounds; and (*b*) payable, if and in such cases as regulations "so provide, by instalments. The scale prescribed for the pur- "poses of this subsection shall be the same for all persons, except "that a lower amount may be fixed thereby for cases where at the "beginning of the period taken into account by the assessment "the beneficiary is under the age of eighteen . . ."

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[5] (1958) unreported, October 3.

[6] [1959] 1 W.L.R. 724.

The rates of disablement pension were set out in the Third Schedule to the Act of 1946, but these have been replaced by new rates established by the Second Schedule to the National Insurance (No. 2) Act, 1957. The current scale of disablement gratuities is contained in the National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations (S.I. 1957, No. 2074), First Schedule, Part II, which fixes the new amount of gratuity for degrees of disablement from 1 per cent. to 19 per cent. Under these provisions the maximum amount of disablement gratuity for disablement of less than 20 per cent. is £280. The weekly pension ranges from 85s. for 100 per cent. disablement to 17s. for 20 per cent. disablement, there being a reduction of 8s. 6d. a week for every 10 per cent. decrease in extent of disablement.

It is provided by the National Insurance (Industrial Injuries) (Benefit) Regulations (S.I. 1948, No. 1372), reg. 3: "Where "the extent of a claimant's disablement is assessed at any of "the degrees of disablement severally specified in the first column "of the Second Schedule to these regulations, the amount of any "disablement gratuity payable shall—(*a*) if the period taken into "account by that assessment is limited by reference to the claimant's life or is not less than seven years, be the amount specified "in the second column of that Schedule as appropriate to that "degree of disablement; (*b*) in any other case, be an amount "which bears the same proportion to the amount so specified as "the period taken into account by the assessment bears to a "period of seven years, a fraction of a shilling being, for this "purpose, treated as a shilling."

It was therefore submitted for the respondents that as the lump sum payable for disablement gratuity was the same whether the assessment was for the claimant's life or for not less than seven years the gratuity was on the basis of a seven years' purchase and no more, and that was the only material period to be considered in assessing the benefit which had accrued for the five years since the accident.

Counsel submitted that section 2 (1) of the Act of 1948 when it refers to industrial disablement benefit has to be read in the light of section 2 (6) (*c*), and that the gratuity has to be treated as a payment of so much a week over seven years. On that basis there should be a credit of £75, and not either £105 as found by the judgment or £15 as claimed by the appellant. I do not so read the provisions. On the contrary, section 12 (5) of the Act of 1946 requires an assessment to state not only the degree of disablement in the form of a percentage (in this case 14 per cent. being the extent of the disablement), but also to specify the period taken into account thereby (in this case life). Subsection 6 (*c*) of section 2 of the Act of 1948 requires the gratuity to be treated as benefit "for the period taken into account." Here that is for life and not for a period of seven years as the respondents contend.

This is the conclusion to which Edmund Davies J. came in the reported judgment, without reference to this vital subsection, and it is contrary to the views of Finnemore J. in this case.

The result is that where under section 2 (1) of the Act of 1948 there has to be taken into account against any loss of earnings or profits of the injured person one-half of the value of any rights which have accrued, or probably will accrue, to him therefrom in respect of industrial disablement benefit for the five years beginning within the time when the cause of action accrued, the amount of the disablement gratuity to be so taken into account should be half of such proportion of the gratuity as the five-year period (or the unexpired period thereof) bears to the injured person's expectation of life, if the gratuity is for life, or to any less period specified for the duration of the gratuity.

No point was taken before this court that the words "shall be "taken into account" meant anything other than "shall be "deducted," when the benefits have been assessed and so are ascertainable. All the judgments under review have so accepted it. I would agree with this view. But where the court has to assess the value of any rights which "probably will accrue" there can be no accurate assessment possible, and the court will then take them into account by way of an estimated allowance.

Mr. Atkinson made a further submission that, assuming that this construction is to be accepted, as £210 had in fact been received within the five-year period it could be invested in the purchase of an annuity or otherwise, and was worth something more than the aggregate of a succession of payments paid as each week fell due. Far from this point having been taken at the trial, at which Mr. Atkinson was not present, it seems to have been agreed that if the plaintiff was right in principle on this matter the total benefit to be taken into account was half of £30. I find nothing in the Act to support the respondents' argument, and section 2 (6) (*c*) is against it; and, having regard to the small amounts of gratuity, decreasing to £28 for 1 per cent. disablement, and the unlikelihood of the recipients so treating the gratuity or of it being contemplated that they would do so, I think common sense requires the argument to be rejected.

I, therefore, would allow the appeal on this point and, by reducing the credit from the sum of £105 which the judge awarded to the sum of £15, the total damages for which judgment should be entered are £702 7s. 9d. As this sum is in excess of the £700 paid into court, the plaintiff is entitled to the costs of the trial in substitution for the judge's order.

The appellant's third point of appeal does not therefore arise, but as Finnemore J. gave leave to appeal I will make brief reference to the submission.

As the matter stood at the trial, judgment was entered so far as costs were concerned with costs to the respondents up to the date of the payment into court, the defendants to recover against the plaintiff their costs of defence from the date of payment into court, both to be taxed.

In the course of the argument the judge said: "I think the "proper course to follow here is the one I confess I was always "brought up on—which is, that the plaintiff has his costs up to "the time of payment in and the defendant has the costs there-"after." The appellant had asked for the costs of the issue of liability on which he had succeeded, and in this court it was submitted that he was entitled to these costs. In my experience also it is very rarely that a plaintiff in such an action as this and in similar circumstances is awarded the costs of the issue of liability. It is a matter in the discretion of the trial judge and, whichever way he might exercise it, this court would not intervene except in special circumstances within the decision of *Evans* v. *Bartlam*.[7]

The action of tort consists of wrongdoing and damage resulting therefrom: *J. R. Munday Ltd.* v. *London County Council*[8]; and the plaintiff must prove both to obtain a judgment. On the face of it, there can be no complaint and no ground for an order for costs of the issue of liability because the plaintiff has been called on to prove a case to establish his right to damages and has failed to get more than the amount in court. A payment into court is an offer to dispose of the action and, if accepted, prevents all further costs. A plaintiff who continues an action after a payment in takes a risk and cannot normally complain if he has to pay all the costs which his acceptance of the offer would have avoided.

Order 22, rule 6, took its present form in 1933, and provided that payment into court should not be disclosed "to the Judge "or Jury until all questions of liability and amount of debt or "damages have been decided, but the Judge shall, in exercising "his discretion as to costs, take into account both the fact that "money has been paid into Court and the amount of such "payment." Counsel for the appellant relied on a number of cases cited in the White Book [Annual Practice, 1960, at p. 535] in the notes to this rule, and submitted that the plaintiff was entitled to the costs of the issue on which he had succeeded. Those cases must be treated as relying on their special facts. I do not think they can be regarded at the present time as authorities which require a judge to grant such costs, or which require this court to intervene if he fails to do so. The whole question must be dealt with in the discretion of the judge in accordance with the rule.

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[7] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646.

[8] [1916] 2 K.B. 331; 32 T.L.R. 559.

I entirely agree with the order Finnemore J. made in the circumstances as they then existed, but, if I did not, I do not think that this court could in the circumstances of the case have altered it.

The appeal will be allowed and judgment entered for the plaintiff for £702 7s. 9d. with costs here and below.

Ormerod L.J. I have had an opportunity of reading the judgment which has just been delivered by my Lord, and I am in full agreement with it. There is nothing I wish to add.

Upjohn L.J. I agree. I am unable to accept Mr. Atkinson's ingenious arguments that on the true construction of section 2 (6) (*c*) of the Law Reform (Personal Injuries) Act, 1948, the period taken into account by the assessment of the extent of the disablement is the period of seven years merely because that is, in fact, the number of years on which the gratuity is calculated. It seems to me quite plain that the "period taken into account" is the period which by statute must be stated in the assessment of the extent of the disablement, and, in this case, that is a period for life.

It follows, therefore, that half of the gratuity in question, that is, the sum of £105, must be taken as spread over the period of the life of the appellant. How is that to be done in practice? There seemed to me during the course of argument much to be said for taking the view that one ought to treat this sum of £105 as representing a capital sum which must be treated as invested in a pension for the life of the annuitant, and that would involve some computation by reference to the mortality and annuity tables to see what annuity this sum would purchase for a man aged, in this case, 35 years. If that be done it cannot be doubted that a higher pension would result than a mere division of £105 by the expectation of life of the annuitant; and that,in this particular case, would have an all-important effect on the question of costs.

However, it seems to me, looking at subsection (1) of section 2 of the Act of 1948, that no precise or exact calculations were intended to be made. The trial judge may have to take into account industrial injury benefits which will probably accrue, but which may not have been assessed or finally assessed at the date of judgment. Small sums are involved, and, in fact, it is most unlikely that the beneficiary would in fact purchase an annuity with his gratuity.

The figures to be taken into account for the purposes of subsections (1) and (6) (*c*) have to be determined by the judge, and he will do so on the evidence before him, exercising his own judgment and common sense. If, for example, a gratuity is assessed for life but there is no evidence before the judge as to the beneficiary's expectation of life, he will, no doubt, make some rough and ready assessment of the proper proportion of the gratuity to be taken into account, just as Ashworth J., in my judgment quite rightly, did in *de Ridder* v. *Ford Motor Co. Ltd.*[9]

In this case there was evidence before the judge of the appellant's expectation of life, and the parties actually agreed on the figure to be taken into account on the footing that the appellant's contention was correct in law. In my judgment, that figure should be adopted in this case, with the result that my Lord has indicated.

Appeal allowed.
Judgment entered for the plaintiff for the sum of £702 7s. 9d. with costs in the Court of Appeal and below.
Leave to appeal to the House of Lords refused.

Solicitors: *W. H. Thompson; Carpenters.*

M. M. H.

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[9] (1958) unreported, October 3.

REGINA *v.* McVITIE.

C. C. A.
1960
May 9, 23.

Lord Parker C.J., Stable, Donovan, Ashworth and Salmon JJ.

Crime—Court of Criminal Appeal—Proviso to section 4 (1)—*Defective indictment—Incomplete particulars and arraignment—No embarrassment or prejudice to defence—No substantial miscarriage of justice—Whether proviso applicable—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1), *proviso.*

Crime—Indictment—Particulars—Accurate statement of offence—Defective particulars—Whether indictment bad—Explosive Substances Act, 1883 (46 *Vict. c.* 3), *s.* 4 (1)—*Indictments Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 90), *s.* 3, *Sch.* 1, *r.* 4 (3), (4).

Crime—Explosive substances—"Knowingly" possessing—Omission of word "knowingly" in indictment—Whether offence disclosed—Explosive Substances Act, 1883, *s.* 4 (1).

The appellant was convicted on an indictment, the statement of offence in which charged him and three other men with "Possessing "explosives, contrary to section 4 (1) of the Explosive Substances "Act, 1883."[1] The particulars of offence in the indictment stated that the four men "had in their possession a certain explosive "substance . . . under such circumstances as to give rise to a "reasonable suspicion that it was not in their possession for a "lawful object." On the arraignment, the particulars of the offence alone were read. The appellant appealed against his conviction on the ground that by reason of the omission of the word "knowingly" from the particulars of the offence, he had been tried and convicted in respect of an offence unknown to the law. He had in fact admitted that he knew that he had explosives in his possession, and it was conceded that he was in no way embarrassed by the omission.

On the appellant's contention that the indictment was not merely defective but bad, in that it disclosed no offence, and that that was a substantial miscarriage of justice precluding the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907[2]:—

Held, that if the words "necessary for giving reasonable in-"formation" in section 3 (1) of the Indictments Act, 1915,[3]

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[1] Explosive Substances Act, 1883, s. 4 (1): "Any person who makes or "knowingly has in his possession or "under his control any explosive "substance, under such circumstances "as to give rise to a reasonable "suspicion that he is not making it "or does not have it in his possession "or under his control for a lawful "object, shall, unless he can show "that he made it or had it in his "possession or under his control for "a lawful object, be guilty of "felony. . . ."

[2] Criminal Appeal Act, 1907, s. 4 (1): "The Court of Criminal Appeal "on any such appeal against convic-"tion shall allow the appeal if they "think that the verdict of the jury "should be set aside on the ground "that it is unreasonable or cannot be "supported having regard to the "evidence, or that the judgment of "the court before whom the appellant "was convicted should be set aside "on the ground of a wrong decision "of any question of law or that on "any ground there was a miscarriage "of justice, and in any other case "shall dismiss the appeal: Provided "that the court may, notwithstanding "that they are of opinion that the "point raised in the appeal might be "decided in favour of the appellant, "dismiss the appeal if they consider "that no substantial miscarriage of "justice has actually occurred."

[3] Indictments Act, 1915, s. 3: "(1) Every indictment shall contain, "and shall be sufficient if it con-"tains, a statement of the specific "offence or offences with which the "accused person is charged, together "with such particulars as may be "necessary for giving reasonable in-"formation as to the nature of the "charge. (2) Notwithstanding any "rule of law or practice, an indict-"ment shall, subject to the provisions "of this Act, not be open to objection "in respect of its form or contents if "it is framed in accordance with the "rules under this Act."

S. 5 (1): "Where, before trial, or "at any stage of a trial, it appears "to the court that the indictment is "defective, the court shall make such "order for the amendment of the "indictment as the court thinks neces-"sary . . . unless, having regard to "the merits of the case, the required "amendments cannot be made with-"out injustice. . . ."

Sch. 1: "Rules . . . 4 (3) The "statement of offence shall describe "the offence shortly in ordinary imported an objective test, the word "knowingly" should have been included in the particulars of the offence, but that since the offence was accurately described in the statement of offence, the omission of that word from the particulars did not make the indictment bad, but merely defective or imperfect, so that the application of the proviso was to be considered on the basis that the indictment disclosed a known offence with incomplete particulars; that, considering the matter on that basis, and as no embarrassment or prejudice had been caused to the appellant by the omission of the word "knowingly" from the particulars and the arraignment, and the essential ingredient of knowledge had been established, no substantial miscarriage of justice had occurred within the meaning of the proviso; and that, therefore, the proviso should be applied and the appeal dismissed.

Rex v. *Thompson* [1914] 2 K.B. 99; 30 T.L.R. 233; 9 Cr.App.R. 252, C.C.A. applied.

Rex v. *Hyde* (1934) 24 Cr.App.R. 149, C.C.A. not followed.

Rex v. *Franks* (1950) 34 Cr.App.R. 222; [1950] 2 All E.R. 1172n., C.C.A. distinguished.

APPEAL against conviction.

On April 3, 1959, the appellant, Jack Dennis McVitie, and three other men, Martin Harris, Thomas Edward Harris and Bernard Stewart, were charged at Cambridge Quarter Sessions, with possessing explosives, contrary to section 4 (1) of the Explosive Substances Act, 1883. Count 1 of the indictment was in the following terms: "Statement of offence. Possessing "explosives, contrary to section 4 (1) of the Explosive Substances "Act, 1883. Particulars of offence. Jack Dennis McVitie and "Martin Harris and Thomas Edward Harris and Bernard Stewart "on 17 February, 1959, in the County of Cambridgeshire had in "their possession a certain explosive substance to wit a four "ounce slab of plaster gelatine and four electric detonators under "such circumstances as to give rise to a reasonable suspicion that "it was not in their possession for a lawful object." On the arraignment only the particulars of offence in the indictment, and not the words which constituted the statement of offence, were read out, so that all that the accused men and the jury heard were the particulars of the offence. All four men pleaded not guilty, but were convicted, and each was sentenced to seven years' imprisonment.

"language, avoiding as far as possible the use of technical terms, and "without necessarily stating all the "essential elements of the offence, "and if the offence charged is one "created by statute, shall contain a "reference to the section of the "statute creating the offence. (4) "After the statement of the offence, "particulars of such offence shall be "set out in ordinary language, . . ."

The explosives had been found by the police in a paper bag in a car in which the men were travelling. The defence of Thomas Harris and Bernard Stewart was that they did not know that explosives were in the car, and that defence was supported by the evidence of the appellant and of Martin Harris, the appellant having made a statement to the police to that effect and admitted his own knowledge. In his summing-up the chairman omitted to explain to the jury that the prosecution must establish that each of the accused men knew that the contents of the paper bag were explosives, and, having regard to that omission and to the omission of the word "knowingly" from the particulars of offence in the indictment, the court, on November 9, 1959, quashed the convictions of Thomas Harris and Bernard Stewart.

McVitie now appealed against his conviction on the ground that he was indicted, tried, convicted and sentenced for a non-existent offence, namely, the possession of explosives, as evidenced by the decision of the court in the appeals of his co-defendants, Thomas Harris and Bernard Stewart; that his conviction was wrong and contrary to law, and his appeal should likewise be allowed; and that the conviction and sentence was a miscarriage of justice.

On April 27, 1960, the court (Lord Parker C.J., Ashworth and Salmon JJ.), after hearing argument, inter alia, as to a venire de novo,* ordered that the appeal be relisted for hearing by a full court for argument as to whether any authority precluded the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

The facts are more fully stated in the judgment of the court.

C. G. L. Du Cann and *Miss Beryl Cooper* for the appellant. The indictment is bad on its face. The court will distinguish between a flaw or a trifling defect in an indictment, which can be cured under section 5 of the Indictments Act, 1915, and a fatal defect which can only be met by a motion to quash: see *Rex* v. *Hughes*,[4] in particular *per* Lord Hewart C.J.[5] Since knowledge is an essential ingredient of the offence under section 4 (1) of the Explosives Act, 1883 (*Reg.* v. *Hallam* [6]), the omission of the word "knowingly" from the particulars of offence is an omission of a fundamental matter. The particulars disclose no offence known to the law and, therefore, the indictment is totally bad and incurable. The arraignment, also, was bad. Arraignment is not a mere formality but is an essential step in the protection of accused persons, and even if the whole of the indictment and not merely the particulars had been read, the omission would still have been fatal. The whole of the trial thereafter, the plea, the prosecution and the defence, proceeded on a false basis, while the judge, in summing up, fell into the same error and there was a misdirection as to knowledge. In consequence, the trial was conducted without any reference to knowledge, and as if it were unnecessary, and the jury must have deliberated on that basis. The obvious remedy would be a retrial, but since the court, after consideration, has reached the conclusion that a venire de novo would not lie, the only remedy is to quash the conviction.

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* On April 11 and April 26 and 27, 1960, argument was addressed to the court and authorities cited on issues which do not call for report.

[4] (1927) 20 Cr.App.R. 4; 43 T.L.R. 250.

[5] 20 Cr.App.R. 4, 8.

[6] [1957] 1 Q.B. 569; [1957] 2 W.L.R. 521; [1957] 1 All E.R. 665; 41 Cr.App.R. 111.

This is not a case in which the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied. The statement by the appellant admitting knowledge is irrelevant for this purpose: the defence was not put on notice to challenge knowledge, and the appellant might have been able to give some explanation. It is a fundamental right forming part of our law that a guilty man, no less than an innocent man, is entitled to a valid trial. But, in the circumstances, this trial was a nullity, and in such circumstances the court has refused to apply the proviso: see *Rex* v. *Schweller*[7]; *Rex* v. *Taylor*[8]; *Rex* v. *Hughes*[9] and *Rex* v. *Hyde.*[10] [Reference was also made to *Rex* v. *Franks*[11]; *Reg.* v. *Stewart and Harris*[12] and *Rex* v. *Neal.*[13]] *Rex* v. *Hyde*[14] is conclusive in the appellant's favour. *Rex* v. *Harris*[15] should be distinguished because the words there omitted were not a necessary ingredient of the offence. Cases such as *Rex* v. *Thompson*[16] and *Rex* v. *Johnson,*[17] where the indictment was bad for duplicity, should also be distinguished: duplicity goes to no more than prejudice and embarrassment to the defence, whereas here the indictment itself was invalid and the trial a nullity.

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[7] (1924) 18 Cr.App.R. 52.

[8] (1924) 18 Cr.App.R. 105; 40 T.L.R. 836.

[9] 20 Cr.App.R. 4.

[10] (1934) 24 Cr.App.R. 149.

[11] (1950) 34 Cr.App.R. 222; [1950] 2 All E.R. 1172n.

[12] The Times, Nov. 10, 1959.

[13] [1949] 2 K.B. 590; 65 T.L.R. 557; [1949] 2 All E.R. 438; 33 Cr.App.R. 189.

[14] 24 Cr.App.R. 149.

[15] (1910) 5 Cr.App.R. 285.

[16] [1914] 2 K.B. 99; 30 T.L.R. 233; 9 Cr.App.R. 252.

[17] [1945] K.B. 419; 61 T.L.R. 386; [1948] 2 All E.R. 105; 30 Cr.App.R. 159.

[DONOVAN J. referred to *Rex* v. *Oster-Ritter.*[18]]

That case, also, should be distinguished: in this case it was not only the summing-up that was wrong. The balance of authority is in favour of quashing this conviction.

There was a miscarriage of justice within the meaning of the proviso to section 4 (1). The "justice" there referred to must mean justice according to law, and must include the proper functioning of the legal machinery for obtaining that justice. Here, the legal machinery did not function properly, and the appellant was deprived of the right which every accused person has of being tried according to law. To deprive an accused person of the protection given by an essential step in criminal procedure is a substantial miscarriage of justice: see *Crane* v. *Director of Public Prosecutions*,[19] *per* Lord Sumner.[20] The test is not whether an appellant is guilty, but whether, however guilty, he has had the valid trial to which he was entitled. Should the court apply the proviso in this case, it will be authority that it should be applied in every case where there has been an irregularity, no matter how serious.

F. H. Lawton Q.C. and *J. G. Leach* for the Crown.* The indictment itself was in the proper form. The statement of offence complies with the Indictments Act, 1915, and the Indictment Rules in the Schedule to the Act. There was a proper charge of an offence known to the law before the court, and the only defect was that there were insufficient particulars. Under section 3 of the Act of 1915 and rule 4 (3) of the Rules, the test is whether the particulars are sufficient to give reasonable information as to the nature of the charge, and when the accused person knows what are the ingredients of the offence, the omission of one particular is not of significance. The omission of the word "knowingly" is no more than a defect which could have been cured by the trial court under section 5 of the Act of 1915: see *Rex* v. *Fraser.*[21]

The direction as to knowledge in the summing-up was adequate. It is clear from the summing-up that the appellant had never contested that he had knowledge that the substance was in his possession, or that it was an explosive substance, and that his defence was lawful excuse. It is also clear that he appreciated the importance of that issue and was not misled. The jury, therefore, had before them what amounted to admissions by the appellant of all the ingredients of the offence and, on its face, there could not be a clearer case in which no substantial miscarriage of justice in fact occurred.

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[18] (1948) 32 Cr.App.R. 191.

[19] [1921] 2 A.C. 299; 37 T.L.R. 788 (sub nom. *R.* v. *Crane*); 15 Cr. App.R. 183.

[20] [1921] 2 A.C. 299, 331.

* Counsel appearing for the Crown on the appeal did not appear for the prosecution at the trial.

[21] (1923) 17 Cr.App.R. 182; 40 T.L.R. 81.

Like the indictment, the arraignment was merely defective and not wholly bad. The object of the arraignment is to enable the accused person to understand the charge: see Hale's Pleas of the Crown, vol. 2, pp. 216, 219; Blackstone's Commentaries, vol. 4, pp. 322, 323, and Stephens' History of the Criminal Law, vol. 1, p. 297. [Reference was also made to Archbold's Criminal Pleading, Evidence and Practice, 33rd ed. (1954), p. 133, para. 244.] The modern practice is to give the substance of the charge, and if that is done and it is clear that the accused person did in fact understand the charge, a verbal slip or the omission of a word does not amount to a miscarriage of justice.

On the construction of section 4 (1) of the Criminal Appeal Act, 1907, there is no limitation on the type of case or circumstances in which the court may apply the proviso. It cannot apply to the first part of the main provision of the subsection, for a verdict which cannot be supported on the evidence is always a miscarriage of justice, but it must apply to the later part, that is, in the case of any wrong decision of any question of law or of any miscarriage of justice.

Where all the essential matters are before the jury the test is whether a reasonable jury after a proper direction would, on all the evidence, have convicted: see *Rex* v. *Cohen and Bateman* [22]; *Rex* v. *Haddy* [23] and *Stirland* v. *Director of Public Prosecutions*.[24] [Reference was also made to *Woolmington* v. *Director of Public Prosecutions*.[25]] Although, primarily, a mistake in an indictment may be a matter of law, there was here no wrong decision of any question of law, because there was no decision; the appellant's complaint, therefore, must be regarded as of a miscarriage of justice, and the case is governed by the principles in *Rex* v. *Cohen and Bateman*.[26]

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[22] (1909) 2 Cr.App.R. 197.

[23] [1944] K.B. 442; 51 T.L.R. 253; [1944] 1 All E.R. 319; 29 Cr.App.R. 182.

[24] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13 (sub nom. *R.* v. *Stirland*); 30 Cr.App.R. 40.

[25] [1935] A.C. 462; 51 T.L.R. 253; [1944] 1 All E.R. 319; 29 Cr.App.R. 182.

[26] 2 Cr.App.R. 207.

Nor, in interpreting the section, has the court placed any restriction or limitation on the application of the proviso which is binding on a full court. The court has refused to apply the proviso in some cases where the indictment was defective because, unlike this case, there was a real likelihood that all the material facts were not before the court or, where the indictment was wholly bad, because there was no jurisdiction; but there is no fetter on the court other than that it must do justice. The court's approach to the proviso is that it can go behind technical slips and do substantial justice: see *Rex* v. *Meyer*.[27] For cases where there was an irregularity or a defect in the indictment or arraignment in which the proviso was applied, see *Rex* v. *Cohen*[28]; *Rex* v. *Wilcox*[29] and *Rex* v. *Thompson*[30]: for a more recent case, see *Reg.* v. *Miller and Hanoman Ltd.*[31]—which is stronger than the present case. In *Rex* v. *Edwards*[32] the court, allowing the appeal, approached the matter on the basis, not that the proviso could not, but that, in the circumstances, it should not, be applied. There is, therefore, a line of cases leading up to *Rex* v. *Hyde*[33] in which the proviso was applied in varying circumstances, and had the attention of the court in *Hyde's* case[33] been drawn to them, the decision might have been different. But there is a distinction between this case and *Rex* v. *Hyde*,[33] for there was there a clear misdirection. Cases in which an appeal has been allowed on the ground that the indictment was bad for duplicity should also be distinguished; because in such cases the accused person does not know what offence he is charged with. If the court in *Rex* v. *Hyde*[33] was saying that it had no alternative but to quash the conviction, and was admitting a fetter on the exercise of its discretion under section 4 (1), it is submitted that it was wrong.

There is nothing to justify any fetter on the discretion of the court in any particular class of case. Reliance is placed on *Rex* v. *Thompson*[34]: on one view there was here an error in giving insufficient particulars, but that error in fact caused no embarrassment or prejudice to the appellant. On the reasoning in *Rex* v. *Thompson*,[34] therefore, the court should apply the proviso and dismiss this appeal.

Du Cann in reply. What happened here is more than a technical slip; it is a matter of substance, and the court is asked to follow the distinction drawn by Lord Hewart C.J. in *Rex* v. *Hughes*.[35] The line of cases stemming from *Rex* v. *Cohen and Bateman*[36] is not in point. If, on properly admissible evidence and a proper direction, the jury must have come to a decision adverse to the defendant, there is no miscarriage of justice, but that is not this case because, here, the whole trial from first to last was a nullity. Rule 4 (3) of the Indictment Rules is concerned with the statement of offence. The omission here was in the particulars. The statement of the offence may have contained a proper charge but it was the particulars which were read out, and it was their contents which were in the minds of the jury and all concerned in the trial. The object of the arraignment is not only to inform the accused person of the case he has to meet, but also to inform the jury. The jury here were misinformed at the beginning of the trial and in the summing-up, and throughout never considered the necessary ingredients of the offence. A defendant is entitled to a proper trial and none of the steps in procedure, which are essential for his protection, may be omitted. Reliance is placed on the observations of Lord Sumner in *Crane* v. *Director of Public Prosecutions*.[37] The only question is: Is this miscarriage of justice substantial, that is, does it go to the root of the matter and was it a fair and proper trial? The omission in the particulars is fundamental and, therefore, it is not a case in which the court should apply the proviso to section 4 (1).

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[27] (1908) 1 Cr.App.R. 10.
[28] (1909) 3 Cr.App.R. 180.
[29] (1921) 16 Cr.App.R. 91, 102.
[30] [1914] 2 K.B. 99.
[31] The Times, Nov. 11, 1958.
[32] [1913] 1 K.B. 287; 29 T.L.R. 181; 8 Cr.App.R. 128.
[33] 24 Cr.App.R. 149.
[34] [1914] 2 K.B. 99.

LORD PARKER C.J. The court is of the opinion that the appeal fails, and must be dismissed. We will put our reasons into writing and give them at a later date.

Cur. adv. vult.

May 23. DONOVAN J. read the following judgment of the court: The full court dismissed this appeal against conviction on May 9. We now give our reasons for that decision. McVitie together with three other men, namely, Martin Harris, Thomas Harris and Bernard Stewart, was convicted at Cambridge Quarter Sessions on April 3, 1959, of the offence of possessing explosives contrary to section 4 (1) of the Explosive Substances Act, 1883. All four men were sentenced to seven years' imprisonment.

Section 4 (1) [as amended by section 1 (1) of the Criminal Justice Act, 1948] provides: "(1) Any person who makes or

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[35] 20 Cr.App.R. 4.

[36] 2 Cr.App.R. 197.

[37] [1921] 2 A.C. 299. 331.

"knowingly has in his possession or under his control any "explosive substance, under such circumstances as to give rise "to a reasonable suspicion that he is not making it or does not "have it in his possession or under his control for a lawful "object, shall, unless he can show that he made it or had it in "his possession or under his control for a lawful object, be guilty "of felony, and, on conviction, shall be liable to imprisonment "for a term not exceeding fourteen years . . . and the explosive "substance shall be forfeited."

McVitie did not seek to appeal against his conviction within the time limit; but he did apply for leave to appeal against his sentence, and on October 20, 1959, this was refused. At the same time the other three defendants applied for leave to appeal against conviction and sentence. Leave to appeal against conviction only was granted to Thomas Harris and to Stewart. Martin Harris was refused leave to appeal both as regards conviction and sentence.

The appeals of Thomas Harris and Stewart were heard on November 9, 1959,[1] with the result that their convictions were quashed. To understand why, it is necessary briefly to summarise the events which led to the prosecution. All four men were stopped by the police after the motor-car in which they were driving had been chased for some distance by a police car. On a shelf in the back of the men's car was a paper bag which was found to contain gelatine and detonators. Other circumstances, which need not be detailed, raised a reasonable suspicion that these explosives were not intended for any lawful object; and accordingly all four men were prosecuted under the above section 4 (1).

The defence of Thomas Harris and Stewart from the outset was that they did not know that any explosives were in the car, and in this they were supported by the evidence of Martin Harris and McVitie. On this point the chairman in summing up the case to the jury said: "So you have to be satisfied not only that "the explosives were in the motor-car, but that each one of the "men knew they were there, and if you are satisfied on that then "that is the first hurdle surmounted by the prosecution."

That direction was given, however, not in relation to the essential ingredient of knowledge, but of possession. It was not explained to the jury that the prosecution must establish, not only that the contents of the paper bag were in the possession of each of the accused men, but that each one knew that the contents were explosives: see, hereon, *Reg.* v. *Hallam.*[2] This omission was of particular importance in the case of Thomas Harris and Stewart, whose defence was that they did not know that explosives were in the car. It was also of importance for another reason, namely, that while the " Statement of Offence " in the indictment was " Possessing explosives contrary to section " 4 (1) of the Explosive Substances Act, 1883," the particulars of the offence omitted the word " knowingly." This omission may have been in part the reason why the chairman in summing up did not emphasise in the case of Thomas Harris and Stewart that it must be shown that they *knowingly* had explosives in their possession. In the case of the other two defendants, Martin Harris and McVitie, this hardly mattered, because both made statements admitting they knew they were carrying explosives. But in all the circumstances the court felt that would not be right to sustain the convictions of Thomas Harris and Stewart and they were accordingly quashed.

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[1] The Times, Nov. 10, 1959.

Thereupon, McVitie sought leave to appeal against his conviction, and the necessary extension of time for making the application. Leave so to appeal was granted to him on March 26, 1960. The ground of his appeal was that due to the omission of the word " knowingly " from the particulars of the offence given on the indictment, he had been tried and convicted in respect of an offence unknown to the law.

When the appeal was first argued on April 27 last the court, consisting of Lord Parker C.J., Ashworth and Salmon JJ., being satisfied that this was not a case for a venire de novo, indicated that they felt that the appeal called for the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907 (hereinafter called " the proviso "), but that in view of certain existing authorities which appeared to preclude such a course, the case would be relisted for hearing by the full court of five judges. The case was accordingly reargued before us on May 9.

On behalf of the appellant, Mr. Du Cann pointed out that on the arraignment of the accused, the words of the indictment which constituted the " Statement of Offence " were not read to them. The words, as we have said, were " Possessing explosives con- " trary to section 4 (1) of the Explosive Substances Act, 1883." The " Particulars of the Offence " were alone read, and those, so far as material, were: "You had in your possession a certain "explosive substance . . . to wit a four ounce slab of plaster "gelatine and four electric detonators under such circumstances "as to give rise to a reasonable suspicion that it was not in your "possession for a lawful object."

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[2] [1957] 1 Q.B. 569; [1957] 2 W.L.R. 521; [1957] 1 All E.R. 665; 41 Cr.App.R. 111, C.C.A.

This, therefore, was all that the accused men and the jury heard as a statement of the offence. All four men pleaded not guilty and the trial proceeded. Mr. Du Cann now says that due to the omission of the word "knowingly" the appellant was arraigned, tried and convicted for a non-existing offence, and accordingly this conviction also should be quashed. Mr. Lawton, for the prosecution, while conceding that the omission of the word "knowingly" from the particulars made the indictment defective or imperfect, argues that this is a clear case for the application of the proviso.

It is conceded that the appellant was in no way embarrassed by the omission in question. He admitted that he knew he had explosives in his possession, and he certainly did not prove, even on a balance of probabilities, that he had them for any lawful purpose. But he says that he was tried on an indictment which was not merely defective but bad, since it disclosed no offence, and this must be a substantial miscarriage of justice precluding the application of the proviso.

Section 3 of the Indictments Act, 1915, provides as follows: "(1) Every indictment shall contain, and shall be sufficient if it "contains, a statement of the specific offence or offences with "which the accused person is charged, together with such particu-"lars as may be necessary for giving reasonable information as to "the nature of the charge."

Rule 4 (3) of the rules contained in the First Schedule to the Act provides that "The statement of offence shall describe the "offence shortly in ordinary language, avoiding as far as possible "the use of technical terms, and without necessarily stating all "the essential elements of the offence, and if the offence charged "is one created by statute, shall contain a reference to the section "of the statute creating the offence"; and rule 4 (4) of the same rules provides: "After the statement of the offence, particulars "of such offence shall be set out in ordinary language, in which "the use of technical terms shall not be necessary."

The indictment in the present case conformed to these provisions, save only in one respect. If the words in section 3, "necessary for giving reasonable information," import an objective test (which we think they do) then the word "knowingly" should have been included in the particulars. In our opinion this did not make the indictment a bad indictment, but simply a defective or imperfect one. A bad indictment would be one disclosing no offence known to the law, for example, where it was laid under a statute which had been repealed and not re-enacted. In the present case the indictment described the offence with complete accuracy in the "Statement of Offence." Only the particulars, which merely elaborate the "Statement of Offence," were incomplete. The question of applying the proviso is to be considered, therefore, not upon the basis that the indictment disclosed no known offence but that it described a known offence with incomplete particulars. In *Rex* v. *Thompson*,[3] an objection to the indictment on the ground of duplicity was overruled at the trial and the accused was convicted. On appeal this court held that the indictment was in fact bad as alleged, but nevertheless applied the proviso and dismissed the appeal. In doing so the court said[4]: "One of the objects of section 4 was to prevent the "quashing of a conviction upon a mere technicality which had "caused no embarrassment or prejudice. Whilst giving the right "of appeal upon any wrong decision of any question of law, the "object of the legislature was that justice should be done in spite "of a wrong decision and that the court should not interfere if it "came to the conclusion that, notwithstanding the wrong decision, "there had been no substantial miscarriage of justice. The court "must always proceed with caution when it is of opinion that a "wrong view of the law has been taken by the judge presiding at "the trial, but when it is apparent, and indeed undisputed, as it is "and must be in this case, that no embarrassment or prejudice "had in fact been suffered in consequence of the pleader having "made the manifest error above mentioned, the court must act "upon the proviso in this section of the Act."

In the present case also no embarrassment or prejudice was caused to the appellant by the defect in the indictment, but he relies on a later decision of this court in *Rex* v. *Hyde*.[5] Hyde was convicted on an indictment in the following terms: "Statement of Offence. Arson, contrary to section 7 of the Malicious "Damage Act, 1861. Particulars of Offence. Cecil Hyde on the "7th day of January, 1930, unlawfully and maliciously set fire "to certain straw then being in a building namely, 32 Union "Street, Dowlais."

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[3] [1914] 2 K.B. 99; 30 T.L.R. 233; 9 Cr.App.R. 252.

[4] [1914] 2 K.B. 99, 105.

[5] (1934) 24 Cr.App.R. 149, C.C.A.

It will thus be seen that the offence was not fully described in the particulars, because the following words which appear in the said section 7 were omitted, namely, "under such circumstances that if the building were thereby set fire to the offence would amount to felony." During the argument Avory J. asked[6] counsel for the Crown: "Is there any case where the proviso has been applied where the indictment is so defective that it discloses no offence?" The answer was: "There appears to be no such case."

Giving judgment, Lord Hewart C.J. said, inter alia[6]: ". . . this count does not disclose any offence at all." And further on[7]: "In our opinion, the point taken by Mr. Bankes is a good point and there is no escape from the conclusion that the conviction cannot stand. It may well be that if the indictment had been in the proper form and that if the summing-up had directed the jury to those crucial words—which it omitted to do—the verdict would have been the same. This, however, is not a case where the court can apply the proviso."

This decision clearly proceeded to some extent upon the view that the indictment disclosed no offence. And this view, in turn, was founded upon the insufficiency of the particulars. But nevertheless the indictment alleged the offence of "Arson, contrary to section 7 of the Malicious Damage Act, 1861"; and the particulars themselves, though inadequate, used the expression "unlawfully and maliciously." This court, therefore, cannot share the opinion expressed in the case that the indictment disclosed no offence; and, accordingly, cannot treat *Hyde's* case[8] as one which ought to be followed in the present case.

In *Rex* v. *Franks*,[9] decided in 1950, the indictment charged the accused with being concerned in dealing in goods the import of which was prohibited or restricted, contrary to section 186 of the Customs Consolidation Act, 1876, but did not contain, as it should have done, an allegation of intent to defraud or to evade the prohibition or restriction. The court, therefore, quashed the conviction on the ground that the indictment did not disclose the offence. The question of applying the proviso did not, apparently, arise.

In a more recent case a different decision was reached, though it must be said that the two cases last mentioned were not apparently cited to the court. In *Reg.* v. *Miller and Hanoman*

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[6] 24 Cr.App.R. 149, 151.

[7] Ibid. 151, 152.

[8] 24 Cr.App.R. 149.

[9] (1950) 34 Cr.App.R. 222; [1950] 2 All E.R. 1172n., C.C.A.

Ltd.[10] the statement of offence was defective in that it alleged that the accused were " Being knowingly concerned in attempting " to evade a prohibition on the export of goods contrary to " section 56 (2) of the Customs and Excise Act, 1952," instead of " Being knowingly concerned in the exportation . . . of goods with " intent to evade " the prohibition imposed by the Act. The offence was, however, accurately described in the particulars. At the trial an objection was taken to the statement of offence as it was worded, but the objection was overruled. On appeal it was contended that the indictment disclosed no offence, and that the conviction should therefore be quashed. But seeing that the particulars accurately described the offence, it was clear that the accused were not prejudiced or embarrassed at all, and this court, holding that no substantial miscarriage of justice had occurred, applied the proviso. Other cases were cited to us, but it is unnecessary to do more than mention them. They included: *Rex* v. *Cohen and Bateman*,[11] *Rex* v. *Wilcox*,[12] *Rex* v. *Schweller*,[13] *Rex* v. *Taylor*[14] and *Rex* v. *Hughes*.[15]

In the present case it is clear that no embarrassment or prejudice was caused to the appellant by the omission of the word " knowingly " from the particulars, or from the arraignment. He had been properly charged in the first place, and properly committed for trial, and the Attorney-General's fiat was in proper form. If the word " knowingly " had been in the particulars and the chairman had said to the jury: " You must be satisfied that " McVitie knew that there were explosive substances in the " paper bag in the car," he would inevitably have gone on to say—as, indeed, he did—" but McVitie admits he had this knowledge." This essential ingredient of the offence was therefore established, despite the omission of the word in question. The present case is, therefore, a clear case where no substantial miscarriage of justice has occurred, and the court accordingly applied the proviso and dismissed the appeal.

In the course of the argument the question was raised, but not fully explored, whether once the court reaches the conclusion that there has been no substantial miscarriage of justice, there is any fetter upon the way the court may decide to exercise its discretion as regards applying the proviso. Section 4 itself leaves the court free in the matter, and there is no restriction unless previous decisions of the court in comparable cases are to be regarded as binding precedents. It is unnecessary to pursue this point in the present case, for we are satisfied, whatever be the right view upon this point, that no previous decision, properly appreciated, precludes the application of the proviso here.

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[10] The Times, Nov. 11, 1958.

[11] (1909) 2 Cr.App.R. 197.

[12] (1921) 16 Cr.App.R. 91, 102.

[13] (1924) 18 Cr.App.R. 52.

[14] 18 Cr.App.R. 105; 40 T.L.R. 836.

[15] (1927) 20 Cr.App.R. 4; 43 T.L.R. 250.

Since leave to appeal was eventually obtained by the appellant his sentence will run from the date of conviction.

Appeal dismissed.

Solicitors: *W. B. Blackwell & Co.; Director of Public Prosecutions.*

J. F. L.

1960
April 5, 12.

Lord Parker C.J., Ashworth and Salmon JJ.

REGINA *v.* GOVERNOR OF BRIXTON PRISON AND OTHERS. *Ex parte* CABORN-WATERFIELD.

Extradition—"Accused" or "convicted" fugitive—Final judgment in default—Conviction and sentence in absence of alleged fugitive criminal—Whether "conviction for contumacy"—Extradition Act, 1870 (33 *&* 34 *Vict. c.* 52), *ss.* 10, 26*—Treaty of* 1876 *between England and France* [*Order in Council dated May* 16, 1878], *art. VII* (c).

Extradition—Foreign proceedings offending English justice—Whether relevant—Judgment in absence of fugitive.

Section 10 of the Extradition Act, 1870, provides: "In the case "of a fugitive criminal accused of an extradition crime, if . . . such "evidence is produced as . . . would, according to the law of "England, justify the committal for trial of the prisoner if the "crime . . . had been committed in England, the . . . magistrate "shall commit him . . .

"In the case of a fugitive criminal alleged to have been convicted "of an extradition crime, if such evidence is produced as . . . "would, according to the law of England, prove that the prisoner "was convicted of such crime, the . . . magistrate shall commit "him . . ."

By section 26: " . . . The terms 'conviction' and 'convicted' "do not include or refer to a conviction which under foreign law "is a conviction for contumacy, but the term 'accused person' "includes a person so convicted for contumacy: . . ."

By article VII (c) of the Treaty between England and France of 1876: "Persons convicted by judgment in default or arrêt de "contumace, shall be in the matter of extradition considered as "persons accused, and, as such, be surrendered."

The applicant, who had been summoned to appear before a French criminal court on January 5, 1956, to answer a charge of theft in France, did not appear, either then or at an adjourned hearing, and in his absence was convicted and sentenced to four years' imprisonment. In French law that conviction was known as a "jugement par défaut" and anyone subject to it had the right at any time, on notice, to have it set aside and the case retried in his presence. On June 2, 1956, the applicant gave the requisite notice, but at the rehearing he again failed to appear, and the court, in accordance with French law, confirmed the conviction and sentence by a "jugement itératif défaut," which judgment, unless notice of appeal were given within 10 days, became final and conclusive. No such notice of appeal was given. On January 12, 1960, the applicant was arrested in this country on a warrant issued under the Extradition Act, 1870, stating that requisition had been made by the French Government for his surrender as "suspected "and accused of the commission of the crime of larceny," and the magistrate committed him for extradition on that basis. Had the applicant been subject to a "jugement par défaut" or "arrêt "de contumace" he would, in effect, have been retried upon his surrender, but being subject to a "jugement itératif défaut" he would, if surrendered, have gone straight to prison to serve his sentence without further trial.

On an application for a writ of habeas corpus on the ground, inter alia, that the basis of the application and committal of the applicant for extradition as an "accused" person was false in law and in fact, in which the respondents relied, inter alia, on section 26 of the Act of 1870 and article VII (c) of the Treaty of 1876 between England and France:—

Held, that, on the true construction of section 10 of the Extradition Act, 1870, a person subject to a final "jugement itératif "défaut" was a person "convicted of an extradition crime" within the meaning of the second paragraph, and not a person "accused" within the meaning of the first paragraph of the section. The words "conviction for contumacy" in section 26 were a translation of the French words conviction "par contumace" and did not include a final "jugement itératif défaut" which was radically different in character, although they did include a "jugement par défaut" which was of the same character, for persons subject to a "jugement "par défaut" and a conviction "par contumace" were retried on their surrender and so fell into the category of accused persons. Accordingly, even though it was not expressly referred to in section 26, a person subject to a "jugement par défaut" might properly be proceeded against and committed as an accused person under the first paragraph of section 10, whereas a person such as the applicant, subject to a final "jugement itératif défaut," who, upon his surrender, would begin serving his sentence without further trial, was not an accused but a convicted person. Nor did article VII (c) of the treaty—which might be prayed in aid to limit but not to extend the scope of the Act—apply to persons subject to a "jugement "itératif défaut"; it related only to persons subject to a "jugement par défaut" and an "arrêt de contumace," whom it was agreed should be treated as accused persons, which was in

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reality what they were, and not to persons who were in reality convicted persons. The committal of the applicant as an accused person, therefore, was wrong in law, and his application for habeas corpus must be allowed.

In re Coppin (1866) L.R. 2 Ch. 47 considered.

Quaere, whether, in proceedings under the Extradition Act, 1870, the courts of this country are bound to commit on proof of a conviction or may inquire into the foreign proceedings and may refuse to commit if the foreign judgment offends against English notions of substantial justice.

APPLICATION for a writ of habeas corpus.

The following statement of facts is taken from the judgment of the court: On October 25, 1955, the applicant, Michael David George Patrick Caborn-Waterfield, together with certain other persons, was duly summoned by the Public Prosecutor in France to appear before the Criminal Court at Grasse to answer a charge of having stolen approximately 23 million French francs and 7,000 United States of America dollars from a certain Jack Warner at Antibes towards the end of the month of August, 1953. The case came on for hearing at Grasse on January 5, 1956. The applicant was represented by counsel but did not appear in person. The case for the prosecution appeared to be formidable and the court intimated that the applicant should be given a further opportunity of attending, should he wish to do so, in order to contradict or explain the evidence against him. Thereupon, the applicant's counsel applied for an adjournment of the trial so that the applicant might attend and give evidence at the adjourned hearing. The court granted the application and adjourned the trial until April 10, 1956. The applicant, however, failed to attend the adjourned hearing and his counsel appeared only out of courtesy to the court to say that he had no further instructions. The applicant was then convicted of the charge against him and sentenced to four years' imprisonment. That conviction in his absence is known to the French criminal law as a "jugement par "défaut." Anyone against whom such a judgment is pronounced has the right at any time thereafter, upon notice, to have the judgment set aside and the case retried in his presence. On June 2, 1956, the applicant, through his advocate, gave the appropriate notice and was duly summoned to appear before the Criminal Court at Grasse on October 4, 1956. On that date the applicant again failed to appear before the court and has never advanced any excuse for his absence. The court then, in accordance with the French law, pronounced judgment against the applicant for the second time and confirmed the former conviction and sentence. That judgment of October 4, 1956, is known to the French criminal law as "jugement itératif défaut." Unless a notice of appeal against such a judgment is given within 10 days it becomes final. No notice of appeal was given and, accordingly, under French law the conviction stands and the applicant is liable to serve the four-year prison sentence imposed upon him.

On January 12, 1960, the applicant was arrested in London on a warrant issued by leave of the chief magistrate. The warrant was in the form prescribed in the Second Schedule to the Extradition Act, 1870.[1] It stated on its face that requisition had been made to Her Majesty's Secretary of State for Home Affairs for the surrender of the applicant "suspected and accused of the "commission of the crime of larceny within the jurisdiction of "the Government of France." The form of warrant made provision for the arrest of a suspected or accused person or a convicted person with an intimation that the inappropriate words should be struck out, and the words "or convicted" were struck out of the warrant. On March 23, 1960, the applicant was brought before the magistrate at Bow Street Police Court to show cause why he should not be surrendered in pursuance of the Extradition Act, 1870, on the ground of his being accused of the commission of the crime of larceny in France. The facts, including the French law referred to above, were all put in evidence by the respondents before the magistrate. Two points were taken before the magistrate on behalf of the applicant. It was argued that no order should be made against the applicant, first, because the applicant was not a person "accused of an extradition crime" within the meaning of section 10 of the Extradition Act, 1870, inasmuch as he had already been convicted of the crime in respect of which his extradition was sought, and secondly, that the proceedings in France were contrary to English notions of substantial or natural justice in that the applicant had been tried in his absence.

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[1] Extradition Act, 1870 [applied in the case of the Treaty of 1876 between England and France, by Order in Council dated May 16, 1878], s. 2: "Where an arrangement has been "made with any foreign state with "respect to the surrender to such "state of any fugitive criminals, Her "Majesty may, by Order in Council, "direct that this Act shall apply in "the case of such foreign state.

"Her Majesty may, by the same or "any subsequent order, limit the "operation of the order, . . . and "render the operation thereof subject "to such conditions, exceptions, and "qualifications as may be deemed "expedient. . . ."

S. 8: "A warrant for the apprehension of a fugitive criminal, "whether accused or convicted of "crime, . . . may be issued—(1) By a "police magistrate on the receipt of the ". . . order of the Secretary of State, "and on such evidence as would in "his opinion justify the issue of the "warrant if the crime had been com- "mitted or the criminal convicted in "England; . . ."

S. 10: "In the case of a fugitive "criminal accused of an extradition "crime, if the foreign warrant autho- "rising the arrest of such criminal "is duly authenticated, and such "evidence is produced as (subject to "the provisions of this Act) would, "according to the law of England, "justify the committal for trial of the "prisoner if the crime of which he is "accused had been committed in "England, the police magistrate shall "commit him to prison, but otherwise "shall order him to be discharged.

"In the case of a fugitive "criminal alleged to have been con- "victed of an extradition crime, if "such evidence is produced as (subject "to the provisions of this Act) would, "according to the law of England, "prove that the prisoner was con- "victed of such crime, the police "magistrate shall commit him to "prison, but otherwise shall order him "to be discharged. . . ."

S. 26: "In this Act . . . The terms "'conviction' and 'convicted' do not "include or refer to a conviction "which under foreign law is a con- "viction for contumacy, but the term "'accused person' includes a person "so convicted for contumacy: . . ."

The magistrate rejected both those points and committed the applicant to Brixton Prison for extradition on the ground that he was suspected and accused of stealing 23 million French francs and 7,000 United States of America dollars at Antibes in France on or about August 25 or 26, 1953.

The applicant applied to the court for a writ of habeas corpus, submitting that the magistrate's order was unlawful on the grounds (1) that he was proceeded against as a person accused and not as a person convicted; (2) that the English notions of substantial justice were offended thereby; and (3) that in law and in fact the order should not have been made. Pursuant to the directions of the court given on March 25, 1960, notice of the application was served upon the Home Secretary, the Governor of Brixton Prison and the French Government.

F. H. Lawton Q.C. and *Michael Sherrard* for the applicant. The magistrate's order is bad on its face. First, it states "on "the ground of his being accused," whereas the applicant is not in fact accused, but has been convicted and his extradition is sought, not that he should answer the accusation but that he should begin to serve the sentence passed on him for the offence. Both the application for extradition and the order, therefore, were made on a false basis of fact. The Extradition Act, 1870, distinguishes between an accused and a convicted person, and under section 10 the conditions which must be satisfied before an order is made are different. The "jugement itératif défaut" of the French court was a "conviction" and not a "conviction for "contumacy" within the meaning of section 26 of the Act.

Section 10 presupposes that an accused person has a right to be tried, and "fugitive criminal alleged to have been convicted" in that section means a person against whom there has been made an order which can be set aside: but the "jugement itératif "défaut" cannot be set aside and, therefore, is a conviction. Article VII (c) of the Order in Council incorporating the Treaty of 1876 states that persons convicted by "judgment in default" shall be considered as persons accused, but it is submitted that, in its context, and as a matter of construction, "judgment in "default" there connotes some form of interlocutory judgment which can be set aside, and not a final judgment which cannot be set aside: see the English and French texts of the treaty and compare the difference between an interlocutory and a final judgment in civil proceedings in English private international law. Such a construction is in accordance with the reality of the position. The first judgment of the French court on April 10 may properly be described as a judgment in default since it could be set aside as of right, and in reality the applicant was then in the position of an accused person. But the "jugement itératif "défaut" of October 4, 1956, became, after the expiry of the time in which an appeal might be lodged, a final order which could not be set aside, so that the reality of the applicant's position now is that he is a convicted person. As to the incorporation of the treaty into, and its effect on the construction of, the Act, see *Reg.* v. *Wilson.*[2]

Secondly, even if good in the sense that this form of conviction should be considered by our courts as an accusation, the extradition order, in that the applicant has never had a proper trial, offends against English notions of substantial justice, and ought not to stand. Reliance is placed on the common law principle that the court ought not to sanction the judgments of a foreign court in civil matters if they offend English notions of substantial justice: *Pemberton* v. *Hughes*,[3] in particular *per* Lindley M.R.[4] As to a final judgment, see *Nouvion* v. *Freeman.*[5] That principle must apply equally to criminal matters. If the court refuses to enforce such a judgment where money or property is concerned, a fortiori, where the liberty of the subject is concerned, it will refuse to be bound by the face of the foreign order. It appears that in a civil case it is enough if the party against whom the foreign judgment was made was given an opportunity of being heard: see *Robinson* v. *Fenner.*[6] But in English criminal law the mere opportunity of being heard is not enough. The offence alleged here is a felony in English law, and a person may not be tried for felony in his absence. [Reference was also made to *Jacobson* v. *Frachon.*[7]] The objection to the foreign procedure is that it is contrary to our principles of natural justice.

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[2] (1877) 3 Q.B.D. 42.

[3] [1899] 1 Ch. 781; 15 T.L.R. 211, C.A.

[4] [1899] 1 Ch. 781, 790.

[5] (1890) 15 App.Cas. 1.

Sir Reginald Manningham-Buller Q.C., *J. R. Cumming-Bruce* and *R. A. Barr* for the Home Secretary. If the argument for the applicant based on English notions of substantial justice is right, it would mean that in every case where extradition is sought the magistrate would be under a duty to inquire into the foreign procedure and satisfy himself that it was in accordance with British principles of natural justice. But the provisions of the Extradition Act, 1870, are clear and precise. There is no discretion such as that given by section 10 of the Fugitive Offenders Act, 1881: see *Re Henderson.*[8] In the absence of such a discretion, the magistrate is bound by the Act and may not inquire into the foreign procedure: under section 10 of this Act he must commit on production of the proof required. Any question of contravention of our notions of substantial justice is a matter for the executive which has a discretion to refuse to surrender. Furthermore, the applicant's proposition would lead to the strange result that, while an accused or a convicted person might be extradited, those countries where the Code Napoléon is in force would experience a real difficulty in obtaining the extradition of a person twice condemned in default.

Section 8 of the Act of 1870 shows a distinction between an accused and a convicted person, and section 9, although in the case of a convicted person it must be read subject to the provisions in regard to quantum of proof in section 10, relates to both, and gives an alleged fugitive offender every right to put his case before the magistrate. It is a safeguard that under the definition in section 26 a person convicted for contumacy is to be treated as an accused person, for it means that it is not sufficient to prove the conviction under section 10, but that the magistrate must go behind the conviction and be satisfied that the evidence is sufficient to justify a committal for trial. "Conviction for contumacy" in section 26 means a conviction in the absence of the defendant, and includes a judgment in default: *In re Coppin*,[9] and see Clarke on the Law of Extradition, 4th ed. (1903), p. 233. A judgment in default does not cease to be a conviction for contumacy because it may have different consequences in different circumstances. A "jugement itératif défaut," a repeated "jugement "par défaut," is not the less a judgment in default because, if no appeal is brought, it becomes final, nor, if it becomes final, is its character altered. It is still a judgment in default, and within the words "conviction for contumacy" in section 26. A judgment in default is final in the sense that it stands until the defendant returns to the jurisdiction. "Conviction for con"tumacy" in section 26 cannot be read as if it were followed by the words "which can be set aside." Moreover, it should be remembered that the "jugement itératif défaut" was made and became final by reason of the applicant's own acts.

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[6] [1913] 3 K.B. 835.

[7] (1927) 44 T.L.R. 103; 138 L.T. 386, C.A.

[8] [1950] 1 All E.R. 283, C.A.

Regard should be had to the wording of the treaty: *Reg.* v. *Wilson*.[10] Section 4 of the Act requires any arrangement made with any foreign state applied by Order in Council to be in conformity with the Act, and the Order in Council setting out the treaty is conclusive that the treaty complies with the provisions of the Act. The definition in section 26, therefore, must be construed in the light of article VII (c), under which persons convicted by a judgment in default or "arrêt du contumace" are to be considered as persons accused.

A person convicted for contumacy must come into one of two categories, either of accused or of convicted persons. In putting him into the category of accused persons, Parliament must be assumed to have made a deliberate choice, because he is nearer to an accused than a convicted person. That is in accordance with common sense and reality. Both a conviction for contumacy and a judgment in default are made in the absence of the accused person, and it is right that in both cases extradition proceedings should be brought as against an accused person, so that not merely the conviction but the evidence sufficient to justify committal must be produced.

The court is not concerned with the consequences of a conviction for contumacy by a foreign court. It might be that the Home Secretary has a discretion under the treaty to refuse extradition, and the fact that there would be no retrial might be a material consideration in the case of a British subject; in the case of a French national it would merely be the consequence of the laws of his own country. But the court, in construing the Act, has no such discretion; it is not concerned with whether there will be a retrial, or whether the conviction is final, or if the person surrendered will go straight to serve his sentence. Those are all matters for the law of the country where the offence was committed. This court is only concerned to see whether an extradition crime has been committed, and whether the evidence is such as to support the order: see the statement of the practice of the court in *Rex* v. *Governor of Brixton Prison, Ex parte Perry.*[11] The magistrate acted correctly in committing the applicant and the court is asked to dismiss this application.

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[9] (1866) L.R. 2 Ch. 47.

[10] 3 Q.B.D. 42.

J. H. Buzzard for the Governor of Brixton Prison. Section 26 of the Act of 1870 refers to a conviction "for" and not "of" contumacy, and, therefore, it must be construed as meaning a conviction "of" an extradition crime as a result of contumacy. The meaning of contumacy must be the same whatever foreign code is considered, and, prima facie, Parliament, in using the word, had regard to its meaning as known to English law: see section 1 of the Ecclesiastical Courts Act, 1813. The judgment of the French court recites that the applicant, having been cited to appear, "failed" to do so, and "contumacy" as used in English law is an apt word to describe his failure to appear. [Reference was also made to *In re Coppin.*[12]] If that be wrong, the question of construction arises as to whether the Order in Council of 1878 extended the meaning of "accused person" in the Act to include a person against whom there has been a final judgment, and whether, in view of the provisions of sections 4 and 5 of the Act, it is open to any court to question its validity in that respect. But if the definition is apt to include proceedings such as those in question, the expression "judgment "in default" in the treaty is equally apt, and the fact that the judgment was final is immaterial.

Despite the clear provisions of the Act of 1870 it is difficult to see why the common law principles with regard to refusal to enforce foreign judgments which offend against English notions of substantial justice should not apply to extradition proceedings. [Reference was made to *Macalpine* v. *Macalpine* and the cases referred to therein.[13]] But the applicant was in fact given every opportunity of being heard, and neither the proceedings nor the judgment offend our notions of justice. Nor is a conviction in the absence of the accused person unknown to our law: see, for example, section 15 of the Magistrates' Courts Act, 1952. The principle is the same whether or not the offence be summary and the penalty light.

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[11] [1924] 1 K.B. 455; 40 T.L.R. 181, D.C.

[12] L.R. 2 Ch. 47.

[13] [1958] P. 35; [1957] 3 W.L.R. 698; [1957] 3 All E.R. 134.

Michael Koenig, for the French Government, adopted the arguments for the other respondents. The proceedings were not brought against the applicant as an " accused " person in order to disguise the conviction; they were brought against him as such under the wording of the treaty. Had his extradition been asked for as a convicted person, the French Government would have been met with the argument that, because he had been convicted in his absence, he ought to be extradited as an accused person. It is not repugnant to the distinctive policy of these courts to uphold a foreign judgment procured against a defendant in his absence, provided that it is shown that proper notice was given to the defendant. [Reference was also made to the Foreign Judgments (Reciprocal Enforcement) Act, 1933.] It is submitted that the same principles apply in criminal proceedings.

Lawton Q.C. in reply. The word " accused " could not be more inapt to describe a person who, if surrendered, would go straight to prison to serve his sentence. It is submitted that Parliament placed a person convicted for contumacy into the category of accused persons for the same reasons as, and because of, the decision in *In re Coppin*,[14] that is, because such a person has a right to have the judgment set aside. A person " convicted for contumacy " in section 26, and " by judgment " in default " in article VII (c) of the treaty, means a person who has a right to be tried; such a person is an accused person in the fullest sense. Moreover, a conviction for contumacy, or an " arrêt du contumace," is not a decision of the same kind of court as the tribunal which convicted the applicant. The difference between an " arrêt du contumace " or a judgment by default and a " jugement itératif défaut " is fundamental. There is no safeguard under section 10 of the Act: the magistrate's function is not to weigh the evidence but merely to decide whether, on the uncontradicted evidence for the applying power, there is a prima facie case: *Rex* v. *Governor of Brixton Prison, Ex parte Bidwell.*[15]

Cur. adv. vult.

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[14] L.R. 2 Ch. 47.

[15] [1937] 1 K.B. 305; 53 T.L.R. 1; [1936] 3 All E.R. 1, D.C.

April 12. Salmon J. read the judgment of the court, which, after stating the facts as set out above, continued as follows: In this court Mr. Lawton has argued the same points on behalf of the applicant as he argued before the magistrate. Counsel for the respondents dealt with these points in the reverse order to that in which Mr. Lawton took them. It would perhaps be convenient to deal with these points in the same order as that in which they were dealt with by the respondents' counsel.

The Attorney-General contends that the courts of this country are bound to commit under section 10 of the Extradition Act, 1870, on proof of a conviction, and cannot inquire into the question of whether or not the conviction was secured by means which offend our notions of natural or substantial justice. According to the argument, even if the conviction in this case were contrary to natural justice the magistrate was still bound to commit. The Attorney-General argues that the well-known common law principle that the courts of this country will not enforce a foreign judgment if it offends against English views of substantial justice has no application to proceedings under the Extradition Act, 1870. He argues that that Act excludes this principle and gives the courts no discretion but compels them to commit on proof of a conviction. He says that where the legislature intends to give the courts a discretion in the case of fugitive offenders it does so in plain terms as in section 10 of the Fugitive Offenders Act, 1881. He contends that the legislature in passing the Extradition Act, 1870, intended that our courts should be bound by the foreign conviction even if it grossly contravened all English notions of substantial justice. In such a case he contends that the legislature has enacted that the liberty of the subject should depend not upon the decision of the courts but on the discretion of the executive—the executive having power under the Act to refuse to surrender the alleged fugitive criminal.

This point is one of great importance, but on the view we take of the facts it does not fall to be decided in this case, and we prefer to express no opinion upon it. We are completely satisfied that the proceedings in France in no way offended against English views of substantial justice. The applicant was treated with complete fairness and, indeed, was shown every consideration by the French court; he was fully apprised of the very strong case he had to meet, and repeatedly given the fullest opportunity of meeting it. He elected not to do so and on three separate occasions, without any excuse, he failed to appear in person before the French court. Accordingly, it certainly does not lie in his mouth to complain that the case was dealt with in his absence. It is, moreover, to be observed that in this country there are cases, admittedly most exceptional, in which a man accused of misdemeanour may be tried and sentenced in his absence: see *Rex* v. *Browne*,[1] and section 15 of the Magistrates' Courts Act, 1952. We, accordingly, reject the second point taken on behalf of the applicant.

Mr. Lawton's first point turns upon the true construction of section 10 of the Extradition Act, 1870. If one looks at the section alone it is plain beyond argument that the applicant was a person "convicted of an extradition crime" within the meaning of the second paragraph, and not a person "accused of an "extradition crime" within the meaning of the first paragraph of that section. When an accused person is committed under the first paragraph of section 10 and surrendered to a foreign government he is surrendered for trial. Before that course is taken the magistrate has to be satisfied that a prima facie case is made out. When a convicted person is committed under the second paragraph of section 10 and surrendered to a foreign government he is surrendered to serve his sentence, in which case all that is necessary in the magistrates' court is to prove his conviction.

In the present case the applicant was committed under the first paragraph of section 10 as an accused person but there is no question of his being tried if he is surrendered. He has already been tried, convicted and sentenced in France. If surrendered, he will go to prison to serve his sentence without any further proceedings. Accordingly, if section 10 means what it plainly says, the magistrate has wrongly committed the applicant under the first paragraph of section 10. The respondents argue, however, that the prima facie meaning of the words "accused" and "convicted" in section 10 are altered by section 26 of the Extradition Act, 1870. This is an interpretation section and states: "The terms 'conviction' and 'convicted' do not include "or refer to a conviction which under foreign law is a conviction "for contumacy, but the term 'accused person' includes a person "so convicted for contumacy." We agree with Mr. Buzzard that these words must contemplate a conviction in respect of an extradition crime for contumacy. The respondents contend that the applicant has been so convicted for contumacy and that, accordingly, he was properly committed as an accused person under the first paragraph of section 10. The meaning of the words "for contumacy" in this statute is somewhat obscure and hitherto has never been considered by the courts. In our view these words were introduced into section 26 in order to bring the statute of 1870 into line with the decision in *In re Coppin.*[2] This view is supported by Piggott on the Law Relating to Fugitive Offenders (1910), p. 129. Before the passing of the Extradition Act, 1870, this country had entered into extradition treaties with France and the United States of America. Each of these treaties was the subject of a separate Act of Parliament passed in 1843. Those statutes were the first Extradition Acts to be passed in England. The statute governing the treaty with France was the Extradition Act, 1843 (6 & 7 Vict. c. 75). Under that Act only a person accused of committing an extradition crime could be extradited. No one who had been convicted in France and escaped to England could be extradited in respect of such conviction. The question arose in that case as to whether Coppin was an accused or a convicted person. He was the subject of a conviction "par "contumace" in France for forgery and fraud. In the course of his judgment in *Coppin's* case[3] Lord Chelmsford L.C. made an elaborate investigation into the effect in French law of a conviction "par contumace"; he found[4] that if a person so convicted "is arrested or surrenders himself, that judgment is "annulled, so that it is exactly the same as if no proceedings had "been taken against him, and then he undergoes his trial for the "offence with which he was charged." Lord Chelmsford L.C. came to the conclusion[5] that a person convicted "par contu-"mace" could not properly be described otherwise than as an accused person, since on his apprehension the judgment against him is annulled and he is put upon his trial. In our view, the words "for contumacy" in section 26 of the Act of 1870 were intended as a translation of the French words "par contumace." This view accords with that expressed in Clarke on The Law of Extradition, 4th ed. (1903), p. 233. In our judgment, a conviction for contumacy does not include a final judgment "itératif "défaut" which is radically different in character from a conviction "par contumace." A fugitive criminal convicted "par "contumace" would upon his surrender be tried, whereas a fugitive criminal subject to a final conviction "itératif défaut" would, on his surrender, be sent straight to prison without any further trial.

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[1] (1906) 70 J.P. 472.

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[2] (1866) L.R. 2 Ch. 47.
[3] Ibid. 50.
[4] Ibid. 53.
[5] Ibid. 54.

It is to be observed that section 26 makes no reference to a conviction "par défaut." This may be because the researches into French law by those responsible for drafting it did not go beyond a consideration of the judgment in *Coppin's* case.[6] According to the evidence before us a conviction "par défaut" is exactly the same in character as a conviction "par contumace." The former is a decision of a Tribunal Correctionale which has jurisdiction over "délits," and the latter is the decision of a Cour d'Assises which has jurisdiction over other types of crime. Applying the reasoning of Lord Chelmsford in *Coppin's* case [6] it is clear that anyone subject to a "jugement par défaut" comes into the category of an accused person, rather than into the category of a convicted person. Accordingly, even although a judgment "par "défaut" is not expressly referred to in section 26, in our view any alleged fugitive criminal subject to such a judgment would properly be proceeded against and committed as an accused person under the first paragraph of section 10 of the Extradition Act. But the applicant is not such a person, for he is subject to a final "jugement itératif défaut."

The respondents have sought to rely upon article VII (c) of the Extradition Treaty made between England and France in 1876. The English version of that article reads as follows: "Persons "convicted by judgment in default or arrêt de contumace shall be "in the matter of extradition considered as persons accused, and, "as such, be surrendered." The respondents argue that, on a true construction of the treaty, "persons convicted by judgment in "default" include persons subject to a final judgment "itératif "défaut," and that the words of the treaty must be read into the Extradition Act so as to qualify section 10. Even if the suggested construction of the treaty were correct, which, in our judgment, it is not, it would not avail the respondents. The treaty may be prayed in aid to limit the scope of the Extradition Act (*Reg.* v. *Wilson* [7]), but not to extend it. Were there any ambiguity in the Act it might be possible to look at the treaty in order to resolve the ambiguity. There is, however, no ambiguity in the relevant sections of the Act, and the treaty certainly cannot be used to alter the plain meaning of the words "accused" or "convicted" in section 10. The applicant, being subject to a final judgment "itératif défaut," will, if surrendered, go straight to prison to suffer the sentence imposed upon him. Looking at the realities of the situation he is, in the fullest sense of the words, a convicted person and in no sense an accused person. In any event, article VII

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[6] L.R. 2 Ch. 47.

[7] (1877) 3 Q.B.D. 42.

(c) of the treaty does not in our view apply to judgments "itératif "défaut." Such judgments are certainly not expressly mentioned in the article, and we think that the omission is intentional. As we have already indicated "jugement par défaut" and "arrêt "de contumace" are essentially of the same character. Anyone subject to such judgments is much more akin to an accused person than he is to a convicted person. On the other hand, judgments "itératif défaut" are of an entirely different character. Anyone subject to such a judgment, certainly to such a final judgment, is clearly in the class of convicted persons and not in the class of accused persons.

In our view, the parties to the treaty agreed that the persons referred to in article VII (c) should be treated as accused persons because, in reality, that is what they are. There is no reason to suppose that the parties intended that those who are in reality convicted persons such as the applicant should be dealt with otherwise than as convicted persons.

We have, accordingly, come to the clear conclusion that Mr. Lawton's first point is a good one. We have reached this conclusion with considerable reluctance for the applicant appears to be entirely devoid of merit. Had he been proceeded against and committed as a convicted person it is difficult to see in the circumstances of this case how he could have succeeded in this court. The point raised before us on the construction of the statute is, however, of some importance, and, as the Attorney-General has said, goes far beyond the scope of this particular case. There can be no doubt that upon the true construction of the statute the applicant's committal as an accused person was wrong in law. Accordingly, the application succeeds and the applicant, who has surrendered to his bail and is before this court, will be discharged.

Application allowed, with costs against the Home Secretary and the French Government.

Solicitors: *Blacket, Gill & Prior; Treasury Solicitor; Director of Public Prosecutions; Rowe & Maw.*

J. F. L.

REGINA *v.* HOGAN.
REGINA *v.* TOMPKINS.

C. C. A.

1960
July 4.

Lord Parker C.J., Cassels and Donovan JJ.

Crime—Prison discipline—Jurisdiction—Report to visiting committee for offence against discipline—Award made by visiting committee for escape—Whether subsequent trial for prison breach precluded—Prison Rules, 1949 (*S.R. & O.*, 1949, *No.* 1073), *rr.* 42 (13), 44 [*as amended*].

Crime—Plea—Autrefois convict—Prison discipline—Finding of breach by visiting committee—Privilege forfeited—Subsequent trial—Escape.

Two prisoners serving sentences of preventive detention planned with another man to escape from prison. In order to escape, wire under a skylight had to be cut. The wire was cut and the three men got out through the skylight and escaped. The two prisoners having been recaptured, the Governor of the prison reported them for an offence against discipline under rule 42 (13) of the Prison Rules, 1949,[1] to the visiting committee of justices, and pursuant to rule 44 the visiting committee determined upon the report and made a number of awards forfeiting privileges against the men. Both men were later tried and convicted on an indictment charging them, inter alia, with prison breach. On appeal against the convictions for that offence on the ground that, having already been dealt with by the visiting committee for simple escape, they could not subsequently be charged with prison breach since it was a charge of the same offence of escape in an aggravated form:—

Held, that the principle that a man who had been convicted of an offence could not subsequently be charged with the same offence in an aggravated form in relation to the same facts was confined to courts of competent jurisdiction, and that, as the visiting committee had not convicted the prisoners of the common law offence of simple escape, but, as a matter of internal discipline, had found them guilty of an offence against discipline, there was nothing which precluded the subsequent charge of common law escape in the aggravated form of prison breach. The fact that the prisoners had already been convicted and had forfeited privileges for a breach of discipline was a matter for the trial judge to take into consideration when passing sentence, and there was no ground for interfering with the convictions.

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[1] Prison Rules, 1949 [made under s. 52 of the Criminal Justice Act, 1948], r. 42: "A prisoner shall be "guilty of an offence against discip- "line if he . . . (13) escapes from "prison or from legal custody . . ."

R. 44 (as amended by the Prison Rules, 1952 (S.I. 1952, No. 1405) and The Prison Rules, 1956 (S.I. 1956, No. 1986)): "(1) Where a prisoner "is reported for any of the following "offences . . . (a) escaping or "attempting to escape from prison or "from legal custody . . . the "Governor shall, unless upon investi- "gating the report . . . he is satis- "fied that it should be dismissed . . . "refer the case to the visiting com- "mittee. . . . (3) The committee "shall inquire into every case referred "to them under paragraphs (1) and "(2) of this rule and, if they find "the offence proved, shall (subject, "in the case of a prisoner serving a "sentence of . . . preventive deten- "tion, to the provisions of the rules "in that behalf) make one or more "of the following awards. . . ."

Reg. v. *Miles* (1890) 24 Q.B.D. 423; 6 T.L.R. 186 distinguished.

Rex v. *Thomas* [1950] 1 K.B. 26; 65 T.L.R. 586; [1949] 2 All E.R. 622, C.C.A. considered.

APPEALS against conviction.

On January 18, 1960, the appellants, Michael Hogan and Edward Tompkins, then detained in Parkhurst Prison serving sentences of preventive detention, got out of one of the prison buildings through a skylight, the wire underneath which had been cut, and escaped from the prison. The two appellants were recaptured on the following day, but a third man, Taylor, with whom they had escaped, was still at liberty at the time of the trial.

On February 2, 1960, the visiting committee of justices, acting under rule 44 of the Prison Rules, 1949, made a number of awards forfeiting privileges against each of the appellants for an offence against discipline under rule 42 (13). On March 23 and 24, 1960, the appellants were tried at Winchester Assizes before Hilbery J. on an indictment charging them, inter alia, with prison breach, and were convicted on that count. They were also convicted of aiding a prisoner, Taylor, to escape from prison and resisting a prison officer, and were sentenced to two years' imprisonment on each count, the sentences to run concurrently but consecutive to the sentences they were then serving.

The appellants appealed against their convictions for prison breach on the ground that since they had been convicted of escape by the visiting committee of justices they could not subsequently, on the same evidence, be charged with prison breach.

The facts are more fully stated in the judgment.

Henry Palmer for the appellants. The only difference between the offences of prison breach and simple escape is that the former is accompanied by the use of force. [Reference was made to Archbold's Criminal Pleading, Practice and Evidence, 33rd ed. (1954), paras. 2279, 2295, pp. 1257 and 1262.] Conviction of an offence bars all further proceedings in respect of the same offence in an aggravated form: *Reg.* v. *Miles*.[2] Therefore, the award of the visiting committee in respect of the simple escape was an

[2] (1890) 24 Q.B.D. 423; 6 T.L.R. 186.

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absolute bar to any further proceedings in respect of the same escape. But the prison breach charged was the same escape, although with circumstances of aggravation, dealt with by the justices, and it would have been open to the appellants to have pleaded autrefois convict to the prison breach. If that is right, this court should quash the convictions, and it is not precluded from doing so by the fact that that plea was not raised at the trial.

[LORD PARKER C.J. The appellants were not convicted of escape by a court of law, but were dealt with by the visiting committee for a breach of discipline under the Prison Rules.]

All that is required to support a plea of autrefois convict is a conviction by a court of competent jurisdiction: the visiting committee, acting under jurisdiction derived from the Prison Rules, 1949, were acting under a jurisdiction conferred by Parliament, and must be considered as a competent court in this matter. Even if a plea of autrefois convict would not have been open to the appellants, this case comes within the principle stated in *Reg.* v. *Miles*[3] that a man should not stand in jeopardy twice for the some offence: see, in particular, the judgment of Hawkins J.[4] Nor should a man be punished twice for the same offence.

M. G. Polson for the prosecution. Prison breach and simple escape are two separate and distinct offences. Prison breach involves damage requiring repair by the prison authorities and is a serious offence at common law. Breach of the Prison Rules is a matter of prison discipline, and the visiting committee dealt with the simple escape as such and not as a common law offence. Prison breach is too serious an offence to be dealt with as a matter of prison discipline. The award of the visiting committee in a disciplinary matter is no bar to criminal proceedings. They could have made an award even if the appellants had already been convicted of common law escape by a criminal court.

It is not the law that a man may never be put in jeopardy twice in respect of the same facts: see *Rex* v. *Thomas*,[5] where the assault forming part of the first charge was an element in the subsequent charge of murder. So here, one of the elements in the prison breach was the escape, the other element being the force used in effecting the breach. [Reference was also made to *Reg.* v. *Hinds*.[6]] *Reg.* v. *Miles*[7] was fully considered in *Rex* v. *Thomas*[8] and should be read in the light of the latter decision.

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[3] 24 Q.B.D. 423.

[4] Ibid. 430 et seq.

[5] [1950] 1 K.B. 26; 65 T.L.R. 586; [1949] 2 All E.R. 622, C.A.

[6] (1957) 41 Cr.App.R. 143.

[7] 24 Q.B.D. 423.

[8] [1950] 1 K.B. 26.

But in fact the appellants were never twice in jeopardy in respect of the damage caused by the prison breach because the disciplinary action was taken only under rule 42 (13) in respect of the escape and not, as it could have been, under rule 42 (9) as well. Nor were they in jeopardy of receiving a prison sentence in respect of the element of escape, for the trial court was informed of, and no doubt took into consideration, the award made by the visiting committee.

Palmer in reply. The visiting committee did not make their award in respect of the escape merely as a disciplinary matter. The visiting committee sits as a tribunal set up under statute: their authority to make the award is delegated to them by Act of Parliament and it is to be presumed that Parliament intended the ordinary principles relating to the common law defence of autrefois convict to apply in respect of their awards.

LORD PARKER C.J. These two appellants were convicted at Winchester Assizes before Hilbery J. of prison breach, aiding a prisoner to escape and resisting a prison officer. They were sentenced to two years' imprisonment on each count concurrent, but consecutive to the sentence which they were then serving. They now appeal against conviction for prison breach by leave of the single judge.

The short facts were these. Both appellants were serving a sentence of preventive detention at Parkhurst. They planned with another man, one Taylor, to escape, and, in order to escape, the wire under a skylight, as we understand it, had to be cut. The wire was cut, and although the appellants said that somebody else had done it, the jury quite clearly took the view that, whoever did do it, it was done as part of this plan to escape. In due course the three of them got out through the skylight; they were pursued by some prison officers and in the course of a struggle which ensued one of the prison officers was stunned and suffered a wound on his forehead. Taylor in fact got away and was still at liberty at the time of the trial.

The indictment on which they were charged consisted of five counts, first, prison breach, that is to say, escaping by force; secondly, simple escape; thirdly, aiding a prisoner, Taylor, to escape; fourthly, doing grievous bodily harm to the prison officer with intent, and, lastly, resisting the prison officer. To get the fourth count out of the way first, they were acquitted of doing grievous bodily harm with intent. It is not easy to see why, but the jury could not have been satisfied that they had done grievous bodily wounding with intent, although they found them guilty on the fifth charge.

So far as the simple escape was concerned, Mr. Polson, who appeared for the prosecution, perfectly properly, the appellants being unrepresented, brought to the attention of the judge the fact that the appellants had already been dealt with by the visiting committee of justices. Rule 42 of the Prison Rules, 1949, provides: "A prisoner shall be guilty of an offence against "discipline if he . . . (13) escapes from prison or from legal "custody," and the matter had been reported to the visiting committee for them to inquire into under rule 44, under which the visiting committee had power to determine and award thereon. Pursuant to that rule the visiting committee made a number of awards in regard to the escape from prison; they forfeited all privileges for 28 days, they excluded associated work for 28 days, they forfeited earnings for 28 days and they awarded both men cellular confinement for 15 days. In the case of Hogan they also awarded a No. 1 diet for 15 days, and, finally, the eligibility of both for release was postponed for six months, by which I understand that any remission up to six months was forfeited.

Thereupon the judge struck out the count charging simple escape and the appellants continued to be charged and were convicted for prison breach.

In those circumstances the point taken by Mr. Palmer on their behalf is really this; that prison breach is in effect escaping by force, in other words, it is a simple escape with aggravation; and that if a man has been convicted already, albeit for a different offence, namely, for simple escape, a charge cannot be brought against him subsequently for the aggravated offence if the offences in both cases arise on exactly the same matter. That that is a principle of law is undoubtedly true, as can be seen from *Reg.* v. *Miles.*[1] In that case the defendant had been convicted of simple assault and later it was sought to charge him on indictment with a number of different offences, but arising out of exactly the same assault. It was put as a matter of unlawful and malicious wounding, alternatively, as inflicting grievous bodily harm, and alternatively as an assault thereby occasioning actual bodily harm. Pollock B. referred[2] to the judgment of Cockburn C.J. in *The Queen* v. *Elrington,*[3] where he said: "we must "bear in mind the well-established principle of our criminal law

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[1] (1890) 24 Q.B.D. 423; 6 T.L.R. 186.

[2] 24 Q.B.D. 423, 436.

[3] (1861) 1 B. & S. 688, 696.

"that a series of charges shall not be preferred, and, whether a "party accused of a minor offence is acquitted or convicted, he "shall not be charged again on the same facts in a more aggra-"vated form."

Hawkins J. said[4]: "The true ground upon which these "decisions were based seems to me to be that the summary "conviction or dismissal of the charges in each case operated as "an absolute bar to any future proceedings for or in respect of "the same assault; and as the aggravating circumstances, unless "coupled with the assault, amounted to no crime, there was "nothing to support the indictment."

That decision, as I understand it, remains good law; the only qualification to be put upon it is that the principle does not apply where the consequences have changed. That clearly appears from the decision of this court in *Rex* v. *Thomas*,[5] where a man having been convicted of wounding with intent to murder was subsequently charged with murder, the person assaulted having in the interval died. But where the circumstances remain the same the decision in *Reg.* v. *Miles*[6] is still good law. Accordingly, Mr. Palmer, to whom the court is indebted for his argument, submits that this is just such a case, and that, the appellants having been dealt with by the visiting committee, the charge, albeit in the aggravated form of escaping by force, prison breach, ought not to have been left to the jury.

The court, however, feels that the principle in *Reg.* v. *Miles*[6] is meant to apply and can only apply to the decisions of courts of competent jurisdiction. Though not strictly a case of autrefois convict, it is very much on those lines. It so happens that the offence created under the Prison Rules, 1949, an offence against discipline, is in fact the same as the common law offence of escape, but the visiting committee dealt with the matter as an offence against discipline under the Prison Rules. They have not dealt with the common law offence of simple escape. It follows, therefore, in our judgment that, strictly, Hilbery J. need not have struck out the first count as to simple escape, though clearly it was the sensible thing to do, because if convicted of simple escape alone the judge, in deciding upon the sentence, would have to take into consideration what had already happened as a matter of prison discipline.

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[4] 24 Q.B.D. 423, 432.

[5] [1950] 1 K.B. 26; 65 T.L.R. 586; [1949] 2 All E.R. 662.

[6] 24 Q.B.D. 423.

It is quite another matter to say that a prisoner, having been found guilty of a breach against discipline, cannot then be charged with the common law offence of simple escape in its aggravated form as a prison breach. It seems to us that he clearly can, just as the visiting committee could have dealt with the breach against discipline if that had come before them after the prisoners had been convicted at assizes. The truth of the matter is that the visiting committee are dealing with matters of internal discipline with which this court is in no way concerned.

Accordingly, in our judgment, the charge of prison breach was properly left to the jury; it was for the judge to take into consideration when passing sentence, as no doubt he did, that they had already been convicted of a breach of discipline for simple escape and had forfeited certain privileges. In our judgment, therefore, there is no ground for interfering in this case, and the appeal is dismissed. I would only add this, that if the court had found it necessary to quash the conviction in respect of prison breach, there would be no ground whatever for interfering with the sentence. The only result is that these two men have had a day out of prison.

Appeals dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; John Robinson & Jarvis, Newport, Isle of Wight.*

J. F. L.

BENJAMIN AND ANOTHER *v.* MINISTER OF PENSIONS AND NATIONAL INSURANCE.

1960
June 1.

Salmon J.

National Insurance—Employed person—"Gainfully occupied"—Solicitor's articled clerk—Articles of clerkship containing no provision for remuneration—£100 *paid during one year in four equal instalments to be used for holidays — Whether payment made under contract of service—Whether payment for services or personal gift—National Insurance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 1 (2) (*a*) (*c*).

National Insurance—Case stated—Form—Importance of setting out grounds of decision—R.S.C., Ord. 55*b*.

An articled clerk was employed by a solicitor under articles of clerkship executed on August 31, 1954. The articles, which were in the usual form, contained no provision for remuneration for the clerk, nevertheless he was given small cheques at Christmas 1954 and 1955 as Christmas boxes, it being the practice of the solicitor to make such gifts to his staff. At the beginning of 1956 the solicitor told the clerk that he was pleased with his work and that in recognition of his services he would give him £100 in 1956 to be spent on holidays but that it would be better if the clerk received the money in four equal payments and the clerk was to ask for money when he wanted it. The clerk duly asked for and received £25 in March, July, September and December, 1956.

The Minister of Pensions and National Insurance, on an application by the solicitor made under regulation 3, paragraph (1), of the National Insurance (Determination of Claims and Questions) Regulations, 1948, determined, inter alia, that the clerk was a non-employed person for the purposes of the National Insurance Act, 1946,[1] during 1954 and 1955, but an employed person during 1956. The solicitor moved to have his decision relating to 1956 reversed, claiming that the clerk was not gainfully occupied during that period and should not be regarded as within the class of employed persons:—

Held, (1) that if a servant was employed under a contract of service and money was paid to him for services rendered under that contract, he was a person "gainfully occupied" in employment notwithstanding that the contract made no provision for those payments to be made (post, p. 530).

Vandyk v. *Minister of Pensions and National Insurance* [1955] 1 Q.B. 29; [1954] 2 All E.R. 723 distinguished.

(2) That if a servant was in fact paid money for services during the course of his employment, the fact that when he entered the employment he had no hope, intention or desire of obtaining gain was irrelevant (post, p. 531).

(3) That although no grounds for the Minister's decision were set out in the case stated, it could be inferred from the facts found that he had based his decision that the clerk was an employed person during 1956 on the ground that money paid to him during that year was a reward for his services as a clerk during that year and not as a personal present, so that the gain arose from the employment and not from the personality of the clerk. Accordingly, the Minister had come to a correct decision and the appeal would be dismissed (post, pp. 534, 535).

Blakiston v. *Cooper* [1909] A.C. 104; 25 T.L.R. 164, H.L. and *Seymour* v. *Reed* [1927] A.C. 554; 43 T.L.R. 584, H.L. considered.

Per curiam. When a case is stated for the purpose of an appeal, it is useful for the appellate tribunal to know the grounds upon which the decision appealed against is based. There may be cases where the fact that the appellate tribunal did not know the grounds for the decision would make it impossible for that tribunal to decide the appeal (post, p. 534).

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[1] National Insurance Act, 1946, s. 1: "(2) For the purposes of this "Act, insured persons shall be divided "into the following three classes:— "(a) employed persons, that is to say "persons gainfully occupied in employment in Great Britain, being "employment under a contract of "service; (b) self-employed persons ". . . ; (c) non-employed persons, "that is to say persons who are not "employed or self-employed persons."

Appeal by case stated from a determination of the Minister under the National Insurance Act, 1946.

On August 1, 1957, the appellants, Harold Benjamin and Collins, solicitors, in accordance with the provisions of paragraph (1) of regulation 3 of the National Insurance (Determination of Claims and Questions) Regulations, 1948, made an application for the determination by the Minister of the question whether John Maxwell Kennedy was included in the class of employed persons or in the class of non-employed persons for the purposes of the National Insurance Act, 1946, whilst serving as an articled clerk from August 31, 1954 to August 30, 1957.

The Minister, in accordance with the provisions of regulation 3, paragraph (3), appointed Mr. A. J. A. Compton, a solicitor, to hold an inquiry into the question and to report thereon. On November 8, 1957, an inquiry was held when the appellants and the clerk were represented by counsel and evidence was given by Mr. Harold Benjamin, a partner of the appellants (hereinafter referred to as " the solicitor ") and by the clerk. Mr. Compton made a report to the Minister who found the following facts to be admitted or proved: (1) that at all material times the solicitor carried on business as a solicitor in partnership with Mr. Leonard Collins under the name or style of Harold Benjamin and Collins, Solicitors; (2) that on August 31, 1954, articles of clerkship were executed between the clerk, one George Kennedy, and the solicitor, under which the clerk paid no premium to the solicitor, the solicitor paid no remuneration to the clerk; (3) before the execution of the articles the solicitor told the clerk that there was no question of his receiving any remuneration; (4) that at Christmas, 1954, a member of the solicitor's staff gave the clerk a cheque for £10 drawn in his favour by the appellants; (5) that the solicitor had given instructions for this to be done because the clerk was his articled clerk, because he liked him and because it was Christmas; (6) that nothing was said to the clerk at the time about future Christmas boxes or remuneration; (7) that at Christmas, 1955, the clerk was given a cheque for £25 in the same way and for the same reasons; (8) that it was the custom of the appellants to give Christmas boxes to all the staff; (9) that at the beginning of January, 1956, the solicitor told the clerk that he was pleased with him and that in recognition of his work the appellants would give him £100 in 1956 which he was to spend on holidays and not to use for his general living expenses;

(10) that the solicitor said it would be simpler and better if the clerk received the sum in four equal payments but that he was to tell the solicitor when he wanted some of the money; (11) that at the time of that conversation no definite arrangements had been made about the clerk's holidays or how long they should be; (12) that in 1955 his summer holiday had lasted almost three weeks; (13) that in March, 1956, the clerk asked the solicitor for some money, being about to visit his parents in Wales and was given a cheque for £25 on March 26; (14) that in July, 1956, when about to spend a holiday in Wales he asked for and was given on July 13, a cheque for £25; (15) that he asked for and received a further cheque for £25 on September 28, 1956; (16) that he did not have a holiday in September, 1956, but at that time he was going out of London at weekends and was spending more on his living expenses than the allowance which he received from his father would permit; (17) that from November 17, 1956, the clerk was absent from the solicitor's office, with the permission of the solicitor, attending a firm of law tutors; (18) that he did not work again in the office until July 8, 1957, by which time he had taken the Solicitors Final Examination; (19) that he called on the solicitor for another purpose on December 7, 1956, when he was given a cheque for £25 by him; (20) that the clerk returned to the solicitor's office on July 8, 1957, when the solicitor told him that he would pay him £5 a week as he was to all intents and purposes a solicitor; (21) that the clerk continued to work in the solicitor's office and to receive £5 a week until the expiry of his articles on August 30, 1957.

It was contended on behalf of the appellants and on behalf of the clerk that the clerk was employed under a contract of service, but that as the contract did not provide for payment, he was not gainfully occupied in employment although he received some payments of money, since the gain was not a contractual gain; that he did not enter into or carry on the occupation with the hope or intention of obtaining gain in return for his services; that the payments were only occasional gifts, and were not sufficient in the way of regularity and frequency to cause the occupation to be described as gainful, until he began to receive £5 a week as a regular payment.

The Minister decided that for the purposes of the National Insurance Act, 1946, the clerk was (a) included in the class of employed persons during the periods from January 1 to December 31, 1956, and from July 8 to August 30, 1957; (b) included in the class of non-employed persons during the periods from August

31, 1954, to December 31, 1955, and from January 1 to July 7, 1957.

On December 15, 1958, the appellants had required the Minister to state a case, and the matter came before the court in accordance with R.S.C., Ord. 55b. The appellants moved for the Minister's decision that the clerk was to be included in the class of employed persons during the two periods January 1, 1956, to December 31, 1956, and July 8, 1957, to August 30, 1957, to be reversed, on the ground that the decision was wrong in law for that the clerk was not gainfully occupied in employment within the meaning of the Act and should have been included in the class of non-employed persons during those periods.

J. F. Coplestone-Boughey for the appellants. For the purposes of the National Insurance Act, 1946, all insured persons in Great Britain between the ages of 16 and 65 are divided into three categories, (a) employed persons, (b) self-employed persons, (c) non-employed persons: section 1 (2), paras. (*a*), (*b*) and (*c*). The issue here is whether the solicitor's articled clerk is to be regarded as an employed person within the meaning of paragraph (*a*) or as a non-employed person within the meaning of paragraph (*c*). There is no suggestion that he is a self-employed person within the meaning of paragraph (*b*). "Employed "persons" are defined in paragraph (*a*) of section 1 (2) as "persons gainfully occupied in employment . . . being employ-"ment under a contract of service." The words "employment "under a contract of service" are not in issue. The question is whether the clerk is "gainfully occupied." That phrase is not defined in the Act. To be gainfully occupied three conditions must be satisfied: (1) the employee must be entitled to some gain under his contract of service; (2) he must have entered the employment with the intention of making material gain or, if he entered without such intention, have changed his intention; (3) the gain must arise from his occupation and not be a gift paid to him because of his personal qualities.

1 Having regard to the words of the statute, to be gainfully occupied any gain obtained by an employee must be one obtained under his contract of service. The observations of Slade J. in *Vandyk* v. *Minister of Pensions and National Insurance*,[2] on which reliance is placed, support that submission. See also

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[2] [1955] 1 Q.B. 29, 38; [1954] 2 All E.R. 723.

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C.U. 236 of 1950 [3] of the National Insurance Commissioner under regulation 6 (1) (*h*) of the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948, as to the meaning of "gainful occupation." The court should not find this clerk gainfully occupied unless there was an actual contractual promise by his employer to pay him some remuneration, and the gain he received arose out of that promise. Here there was no such promise. The articles contained no provision for payment. Although, therefore, the £100 paid to him during 1956 was clearly a gain, it was not a gain arising under his contract of service in such a way as to make him gainfully occupied, and therefore an employed person within the meaning of section 1 (2), para. (*a*), of the Act of 1946. The present case is distinguishable from *Society of Accountants in Edinburgh* v. *Lord Advocate (as representing the Minister of Labour)* [4] where a similar submission was rejected. In that case, which concerned an apprentice accountant, there was no provision in the indenture for remuneration to the apprentice, but the master had made regular, if small, annual payments to him and there were findings of fact that the master had adopted a systematic method of payment for all his apprentices. Moreover, that was a case under different words of a different Act, namely, Schedule 1 of the Unemployment Insurance Act, 1920. The dicta of Slade J. in *Vandyk's* case [5] should be preferred to the decision in the Scottish case.

(2) Whether or not in order to constitute gainful occupation there must be a contractual promise to pay the gain, it is submitted that there must be an intention on the part of the employee to obtain remuneration by engaging in the occupation. That was the test adopted by the National Insurance Commissioner in decisions C.U. 30 of 1949 [6] and C.P. 7 of 1949.[7] Prima facie the employee's intention on entering the occupation remains the same until there is evidence of change. It is conceded that the acceptance of regular weekly payments would be sufficient to show a change of intention, but where, as here, there is a single acceptance of £100, the court should not infer a change of intention, even taken in conjunction with the earlier payments made at Christmas, 1954 and 1955.

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[3] Reported decisions of the Commissioner under the National Insurance Acts, Vol. 1, 1948–52, C.U. 236/50 (K.L.).

[4] 1924 S.L.T. 194.

[5] [1955] 1 Q.B. 29, 38.

[6] Reported decisions of the Commissioner under the National Insurance Acts, Vol. 1, 1948–52, C.U. 30/49 (K.L.).

[7] Ibid. C.P. 7/49 (K.L.).

[SALMON J. The test applied by the commissioner in the two cases you have just cited is a very subjective test.]

That may be what Parliament intended. If all Parliament intended to require was that there should in fact be a gain to the employee there could be no argument, but the words used in paragraph (*a*) of section 1 (2) are "gainful occupation," so that the question is: What is gainful occupation? In the two cases cited the commissioner has taken the view that there must be some element of intention on the part of the employee to obtain remuneration. Here no such intention can be inferred.

(3) Even if the gain need neither be promised contractually by the employer nor intended by the employee, it must arise from the occupation and not from the personal qualities of the employee. As to this, the income tax decisions are in point. It is not admitted that every taxable gain imputes a gainful occupation since casual gains are taxable whereas some degree of regularity is required to constitute an occupation. But it would be anomalous if non-taxable payments alone could render an occupation gainful. Under section 156 of the Income Tax Act, 1952, the basic rule for payments under Schedule E is that any profits or gains arising or accruing from any office, employment or pension are taxable. The gloss put upon those words by the courts is payment to a holder of an office which accrues to him by reason of his office, but a payment made to a holder of an office due to his personal qualities is not taxable. The foundation of that rule is to be found in the speech of Lord Loreburn L.C. in *Blakiston* v. *Cooper*,[8] which was a decision under the Income Tax Act, 1842; but the words of that Act were virtually the same as those of the Act of 1952. It is submitted that the £100 paid to the clerk in 1956 was paid to him because of his personal qualities. It was tied to holidays and was not to be used for ordinary living expenses. There may be cases where an arrangement such as that made here would be a sham, but no such suggestion has been made in the present case. As to gifts made on account of personal qualities or by virtue of an office, see *Seymour* v. *Reed*,[9] where Viscount Cave L.C. put the general test[10]; *Calvert (Inspector of Taxes)* v. *Wainwright*, *per* Atkinson J.[11]; *Moorhouse (Inspector of Taxes)* v. *Dooland*, *per* Evershed

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[8] [1909] A.C. 104, 107; 25 T.L.R. 164, H.L.

[9] [1927] A.C. 554; 43 T.L.R. 584, H.L.

[10] [1927] A.C. 554, 559.

[11] [1947] 1 K.B. 526, 530; [1947] 1 All E.R. 282.

M.R.[12]; and *Temperley* (*Inspector of Taxes*) v. *Smith*.[13] The judgment of Vaisey J. in the last cited case contains the most modern complete summary of the cases. On the facts here the clerk should be placed in the category of non-employed persons.

R. A. Barr for the Minister. (1) " Gainfully " occupied is not defined in the National Insurance Act, 1946, but the meaning of that phrase cannot be restricted to cases in which there is a contractual right to remuneration or wages. Section 1 (2) of the Act contemplates both employed persons and self-employed persons as being gainfully occupied. There are self-employed persons who may have no contractual entitlement to remuneration but who are nevertheless gainfully occupied, e.g., writers, artists, members of the Bar; and there are persons employed under contracts of service who may receive no remuneration thereunder but be entirely dependent upon gratuitous payments, e.g., commissionaires, porters and waiters. It cannot be suggested that they are not gainfully occupied. The phrase " gainfully " occupied " imports occupation for some gain, fee or anticipated benefit not necessarily pecuniary and not necessarily commercially profitable. The words of the statute are wide, but for the purposes of the present case it is accepted that the word " gain " has a pecuniary connotation. Contracts of apprentices may or may not be gainful, dependent upon whether there is any expectation of gain, but when an apprentice is promised payment he must be gainfully occupied. *Vandyk's* case [14] is distinguishable from the present because Slade J. was not concerned with the point now before the court. Useful guidance as to the general principles can be obtained from *Society of Accountants of Edinburgh* v. *Lord Advocate*.[15] Although that decision was based on a different Act with different words, the principles assist on the construction of the words " gainfully occupied."

(2) It is not necessary to look at the employee's intention at the moment he enters the occupation to decide whether he is in gainful occupation. The circumstances may change, as here they clearly did change. Whatever the position when the clerk entered into the articles of clerkship, he was working throughout 1956 with the expectation of receiving £100 during that year.

[Salmon J. Has the hope, expectation or desire test ever been adopted in the court?]

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[12] [1955] Ch. 284, 296; [1955] 1 All E.R. 93, C.A.

[13] [1956] 1 W.L.R. 931; [1956] 3 All E.R. 92.

[14] [1955] 1 Q.B. 29.

[15] 1924 S.L.T. 194.

No, but it is submitted that whichever of these tests is applied here, the clerk was gainfully occupied throughout 1956.

(3) As to the appellants' submission that the £100 paid to the clerk was a personal gift and not a payment made in respect of services, the tax cases, if they are relevant—and it is submitted they are not—do not support the appellants' general proposition. If payment is made to the holder of an office in his capacity as office holder and because he has performed that office well it becomes taxable. The observations of Lord Loreburn L.C. in *Blakiston* v. *Cooper*[16] must be read in the light of the facts of that case. It is not disputed that if an employer gave his employee £100 for a holiday because the employee was not looking well it would not be taxable, but that is not this case. This £100 would be taxable because it was not in the proper sense a personal gift. The test laid down in *Seymour* v. *Reed*[17] is accepted, but the nature of the payment has to be inferred from the facts of the case. This payment of £100 was made to the clerk in recognition of his work and was much more like tips paid to a taxi-driver after each journey than a special gift made to him at Christmas. [Reference was made to *Calvert* (*Inspector of Taxes*) v. *Wainwright*,[18] *Moorhouse* (*Inspector of Taxes*) v. *Dooland*[19] and *Temperly* (*Inspector of Taxes*) v. *Smith*.[20]] *Wright* v. *Boyce*[21] is of assistance because, although this is a decision on its facts, the position of the clerk is not dissimilar to that of the professional huntsman in that case who, although he had no contractual right to payment, received payments at Christmas in recognition of his services. Applying the principles of the tax cases, upon these facts it is submitted that as a matter of law the payment of £100 to the clerk falls within the taxable class. On the facts set out in the case the Minister's decision is not wrong in law.

[SALMON J. If the Minister has found as a fact that this money was a payment for services rendered in 1956 and not given as a personal gift that is one thing, but if he has found that the mere fact that money has passed is sufficient to bring the clerk within the Act of 1946 as an employed person that is different.]

The court is specifically empowered to draw inferences of fact and it would be reasonable to draw the inference that the £100 was given to the clerk by his employer in recognition of the services he had rendered during 1956. It would not fall within the category of a personal gift merely because it is expressed to have been given purely for holiday purposes. The Minister's decision gives effect to the ordinary and natural meaning of the words of the statute and it is submitted that on the facts set out in the case it is correct. In those circumstances the court will not interfere. The appeal should be dismissed.

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[16] [1909] A.C. 104, 107.

[17] [1927] A.C. 554.

[18] [1947] K.B. 526.

[19] [1955] 1 Ch. 284.

[20] [1956] 1 W.L.R. 931.

[21] [1958] 1 W.L.R. 832; [1958] 2 All E.R. 703, C.A.

Copleston-Boughey replied.

SALMON J. stated the facts and continued: The question arises whether or not the solicitor and the clerk were liable to pay contributions under the National Insurance Act, 1946. It is from the Minister's decision that the clerk was an employed person for the whole of 1956 and from July 8, 1957, to August 30, 1957, that the solicitor appeals. When the clerk had successfully completed his finals he returned on July 8, 1957, and stayed with the solicitor until August 30, and during that period he was being paid £5 per week. As he was clearly an employed person for that period and the appeal on that point is not pressed, the sole question for me is whether he was an employed person within the meaning of the Act, from January 1, 1956, until December 31, 1956.

The case turns upon the true construction of section 1 (2) of the Act. [His Lordship read section 1 (2) and continued:] The contest really is as to whether the clerk during 1956 was an employed person within the meaning of the words in paragraph (*a*) of subsection (2) of section 1 of the Act; or a non-employed person within the meaning of the words in paragraph (*c*) of subsection (2). No one suggests that he was a self-employed person within the meaning of the words in paragraph (*b*) of that subsection.

The practical effect of the decision is this: that if the Minister is right then the clerk and his employer, the solicitor, are liable to pay the appropriate national insurance contributions for the whole of 1956; and if the Minister is wrong then neither the clerk nor his employer will be obliged to pay any contribution to national insurance during that period.

The first point taken by Mr. Coplestone-Boughey on behalf of the appellants is that the £100 that the clerk received during 1956 was not paid to him under a contract of service. Counsel says, and says truly, that there is not a word about payment to the clerk in any part of the articles of clerkship; they merely impose an obligation upon the clerk to serve his master and on the master to teach his clerk during the whole of that period:

and he relies, too, on the finding that the solicitor informed the clerk before the signing of the articles that there would be no question of the clerk receiving any remuneration. He submits that if the £100 was paid for services, which he strongly disputes, nevertheless it was not paid under the contract of service.

Mr. Barr, on behalf of the Minister, argues that what one has to look at in construing section 1 (2) is whether the person concerned is gainfully occupied, and then, whether he is employed under a contract of service. He argues that it is not at all necessary that the gain should be provided for under the contract of service. He supports that argument by referring to paragraph (*b*) of subsection (2). He says that if one looks at paragraph (*b*) it is obvious that the legislature contemplated that persons could be gainfully occupied but not under any contract of service. He cites, for example, members of the bar who are gainfully occupied but in respect of whom there is no contract of service. He refers, too, to waiters, sometimes paid no remuneration under their contract of service at all, but who rely simply on tips.

It seems to me that this is a valid argument. I cannot believe that the waiter employed under a contract of service without any remuneration from his employers (were this still permissible in law) and recovering large sums weekly by way of tips, would not be gainfully occupied in employment under a contract of service within the meaning of the Act of 1946.

First of all, I think, one has to see if the person concerned is in employment under a contract of service; and then, if he is in employment under a contract of service, is he gainfully occupied? In my judgment it matters not at all that the contract of service itself does not provide for any payment to the servant. In this case there is no dispute that the clerk was employed under a contract of service, and for the purposes of this point it is assumed that the money which was received was received for services. It is true that the money was not paid under the articles of clerkship, but in my judgment that does not make any difference to the liability to pay contributions to the national insurance fund.

Mr. Coplestone-Boughey relied on the judgment of Slade J. in *Vandyk* v. *Minister of Pensions and National Insurance.*[1] It is true that in that case there are certain passages in the judgment of Slade J. which, taken out of their context, seem to lend some support to the argument that the gain must be provided for under the contract of service. It is to be observed, however, that Slade J. was not addressing his mind to the point which arises in the present case at all.

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[1] [1955] 1 Q.B. 29; [1954] 2 All E.R. 723.

In *Vandyk's* case,[1] the sole question was whether or not gainful employment meant that a profit must accrue to the employed person before he came within the provisions of the Act. In that case a disabled man was receiving a salary of £300 a year under a contract of service, plus some travelling expenses to get to and from his work, and the only question was did the fact that he was getting remuneration and expenses under the contract of service establish that he was gainfully occupied notwithstanding that it cost him more to get to and from his work than the total sum he received under the contract?

Slade J. was not considering a case such as this, where a man was serving under a contract of service which made no provision for payment of salary, and I think he was merely addressing his mind to the problem before him and certainly did not intend to deal with a case of this kind. The passages to which Mr. Coplestone-Boughey refers me can support him only if they are read out of their context. Accordingly, I do not think that I can usefully obtain any assistance from *Vandyk* v. *Minister of Pensions and National Insurance.*[1]

I therefore decide against the appellants on the first point without any hesitation. If money is paid to the servant for the services which he has rendered under the contract of service then he is a person gainfully occupied in employment under a contract of service, notwithstanding that the contract makes no provision for those payments.

The second point that Mr. Coplestone-Boughey takes is that the employed person must have entered the employment with the hope, intention, or desire, of being gainfully employed. There is no question but that when this young man entered into his articles of clerkship he had no hope, or no reason to hope, that payment was intended because the articles made no provision for payment. Moreover, he was told that he was not going to get anything by way of remuneration. The point now put forward on behalf of the appellant is based on a decision given by the Commissioner, or observations made by him, in an entirely different context. It may well be that there are cases when it is important to consider what was the hope, intention, or desire of the person alleged to have been employed or self-employed, during the relevant period. For example, a man may be painting a picture, or writing a book, which he hopes to sell later. It may be that for a year or more he will be engaged in producing the picture or book, but he cannot enjoy the pecuniary fruits of his labour until later; nevertheless, during the time that he is bringing his work to fruition he is hoping, intending and desiring to obtain gain from it and during that period he is gainfully occupied. When, however, the person in question is receiving money during the course of his employment it is not, I think, very important to consider what his hopes, intentions or desires were at the time he entered upon his employment or during its course. I do not consider that if a man is in fact paid money for services during the course of his employment the fact that when he entered into his employment he had no hope, intention or desire of obtaining gain is of the slightest relevance.

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[1] [1955] 1 Q.B. 29.

In any event, after the solicitor had told his clerk at the beginning of 1956 that he was going to give him £100 during that year, and that it would be better for him to receive it in four equal instalments, I have no doubt at all that the clerk was then hoping, intending, and certainly desiring, to get the £100 during 1956. In my judgment there is nothing of substance in the second ground upon which it is suggested that this appeal should be allowed.

The third ground is quite different. Mr. Coplestone-Boughey says, and I agree with him, that the gain must arise from the employment and not from the personality of the employed person, and I think he is right in that particular proposition.

The crucial test in this case is whether the clerk was being paid for his services, or whether he was gaining something merely because of his personality and its impact on the solicitor? If the solicitor liked him, as I am sure he did, and thought that he was a promising and charming young articled clerk, and one day said to him "You are looking very ill, I think you have been over-"worked, you had better go away on holiday and I will pay for "it," that would have been a purely personal gift and would in no sense have been payment for services.

But if the solicitor, at the beginning of 1956, said to himself "This young man has now been with me for some 16 months "and he is beginning to be very useful as a clerk and I think "I would like to pay him some money for what he is doing for "me; that would only be fair," and decided to give him £2 a week for the work he was doing in 1956, then it seems to me that that is quite different. I think in those circumstances the clerk is a person gainfully occupied in employment, and that £2 a week, or the £100 paid to him during 1956, could properly be regarded as payment for services.

It is obvious that in cases of this kind there is bound to be a certain amount of overlapping. What is in substance a personal payment to the clerk, because the employer likes him and wants to send him away on holiday, cannot entirely be disassociated from the services the clerk is rendering to the solicitor; and, similarly, when the solicitor decides to pay him for his services during 1956, that cannot be entirely disassociated from the fact that he likes the clerk.

Broadly, it comes in the end to a question of fact. On which side of the line does it fall? Is it a personal gift, or is it remuneration? The broad proposition of law put forward by Mr. Coplestone-Boughey is not very seriously challenged by Mr. Barr. The proposition rests on the analogy which Mr. Coplestone-Boughey draws from the well-known line of tax cases starting with *Blakiston* v. *Cooper*,[2] where the House of Lords were considering whether voluntary Easter offerings of money given as a freewill gift to a clergyman for his personal use are being given for the purpose of increasing his stipend, and assessable to income tax as profits accruing to him by reason of his office under Schedule E of the Income Tax Act, 1842, the Act then in force.

Mr. Coplestone-Boughey says, and I think rightly, that in considering whether a person is gainfully occupied in employment it is useful to look at the cases in which the courts have decided whether or not for the purpose of the Finance Act a man is assessable to income tax on profits accruing to him by reason of his office. He concedes that between those words and the words of the relevant subsection of the National Insurance Act, 1946, there is a crucial difference, as was pointed out in *Vandyk* v. *Minister of Pensions and National Insurance*,[3] decided by Slade J. It is not necessary under the National Insurance Act, 1946, for there to be any profit, but if the words were "money accruing "to him by reason of his office" the analogy would be much more exact.

For the purposes of this case, it does not seem to matter whether the word was profit, which was the short point in the case before Slade J. Lord Loreburn L.C. says in *Blakiston's* case[4]: "In my opinion, where a sum of money is given to an

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[2] [1909] A.C. 104; 25 T.L.R. 164, H.L.

[3] [1955] 1 Q.B. 29.

[4] [1909] A.C. 104, 107.

"incumbent substantially in respect of his services as incumbent, "it accrues to him by reason of his office. Here the sum of "money was given in respect of those services. Had it been a "gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or "a subscription peculiarly due to the personal qualities of the "particular clergyman, it might not have been a voluntary payment for services, but a mere present."

I appreciate that when the solicitor told the clerk that he was going to have £100 during 1956 he told him that he was to spend the money on holidays, but it was to be given to him in four equal instalments. I am certainly not at all persuaded that it was intended purely as a present, indeed I do not think it was intended as a present at all.

The next case to which I have been referred in which the problem which arose in *Blakiston's* case[5] was considered is *Seymour* v. *Reed*,[6] which raised the problem whether Seymour, who was a well-known Kent County professional cricketer, should be taxed in respect of the money which he received for his Benefit. There Viscount Cave L.C. says,[7] after referring to the words of the Income Tax Act, 1918, which were slightly different from the one which was in force in 1909: "These words and the corresponding expressions contained in the "earlier statutes (which were not materially different) have been "the subject of judicial interpretation in cases which have been "cited to your Lordships; and it must now (I think) be taken "as settled that they include all payments made to the holder "of an office or employment as such, that is to say, by way of "remuneration for his services, even though such payments may "be voluntary, but that they do not include a mere gift or present "(such as a testimonial) which is made to him on personal "grounds and not by way of payment for his services. The "question to be answered is, as Rowlatt J. put it: 'Is it in the "'end a personal gift or is it remuneration?' If the latter, it is "subject to the tax; if the former, it is not."

There have been a large number of cases in which this topic has been considered and I do not think that there has ever been any difference of judicial opinion about the principle to be applied. Assuming, as I do, that that principle ought to be applied in the present case, one is brought back to the point every time—was that £100 to be received by this clerk as remuneration, or was it intended as a personal present?

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[5] [1909] A.C. 104.

[6] [1927] A.C. 554; 43 T.L.R. 584, H.L.

[7] [1927] A.C. 554, 559.

In the case which the Minister has stated, he has merely stated his conclusions, but has not given any grounds on which he reached them. If I may say so, when a case is stated for the purpose of an appeal it is very useful for the appellate tribunal to know the grounds upon which the decision appealed against is based. There might be cases where the fact that the appellate tribunal did not know the grounds for the decision would make it impossible to decide the appeal.

In this case, however, I think that I am entitled to draw inferences of fact; under the statute I think I am entitled to look at the whole of the case to deduce what the grounds are upon which the Minister must have based his decision, but it would be much more convenient if, instead of having to deduce them, the grounds were very shortly stated.

I think that the Minister has come to the decision that the £100 was given to this clerk for the work he was to do during 1956 and not as a personal present. I am led to that conclusion by the finding that at the beginning of January, 1956, the solicitor told the clerk that he was pleased with him and that in recognition of his work the appellants would give him £100 in 1956, and that the solicitor said it would be simpler and better if the clerk received the sum in four equal payments, but the clerk should tell him when he wanted some money. I do not think this means that the clerk was being paid £100 in 1956 for what he had done in 1955, but that the solicitor realised that, having regard to the clerk's standard of work in 1955, his work in 1956 would be worthy of reward.

The argument that has been put before me today was fully before the Minister, and this point, that the character of the payments had to be looked at in the light of the authorities to which I have referred, was very fully argued, and the Minister was referred to the cases.

Having heard that argument, the Minister came to the conclusion that the £10 given at Christmas 1954, and the £25 given at Christmas 1955, did not make this clerk gainfully occupied during 1954 and 1955. I think he must have come to that conclusion because he thought that the solicitor had made these payments to him at Christmas purely as a Christmas gift. When, however, he came to 1956 the Minister must have felt that the character of the payment of £100 was entirely different from the character of the earlier payments, because whereas the earlier payments had been pure gifts, as the Minister in effect found, the £100 was and was intended to be remuneration for services.

I appreciate that the clerk was told at the time that he was to spend the money on holidays and not to use it for his general living expenses, but I think that the solicitor (I am not saying a word against him) being no doubt fairly familiar with the law stated in the cases, felt that if possible he would like this clerk to have the money free of tax and free of obligation to pay national insurance contributions. He felt that if he gave it in this form it might well escape liability for tax and would not attract liability to pay national insurance contributions.

I cannot say, on the facts as found, that the Minister has come to a wrong conclusion when he has, as I think, concluded that this clerk was gainfully occupied during 1956 because the four payments of £25 each made by his employer during that period were made by way of remuneration for his services as a clerk.

That really disposes of all the grounds raised by Mr. Coplestone-Boughey in his interesting argument. For the reasons I have stated, none of them commend themselves to me, and the appeal is accordingly dismissed.

Appeal dismissed.
No order as to costs.

Solicitors: *Harold Benjamin & Collins; Solicitor, Ministry of Pensions and National Insurance.*

E. M. W.

WEBB *v.* TIMES PUBLISHING CO. LTD.

[1959 W. No. 2277.]

1960
May 27,
30, 31;
June 2.

Pearson J.

Libel and Slander—Newspaper—Qualified privilege—Report of foreign judicial proceedings—Trial of British subject—Report defamatory of third party—Whether report privileged.

An English newspaper published a report of the trial in a Swiss court of a British subject, H., charged with criminal offences in Switzerland. The report stated that H. told the court that he had recently robbed an English bank and shot a clerk in England, and that in 1950 he had killed one S. out of jealousy. It continued: "Asked if he was married and had a child, H. replied: 'Yes, but "'it was not mine. The father was S.'" H. had, in 1950, been charged with and tried for the murder of S., had been acquitted on that charge, but had subsequently pleaded guilty to being an accessory after the fact to the murder and had served a term of imprisonment for that crime.

The plaintiff, who had, in 1950, been the wife of H. and was the mother of the child referred to, brought an action for libel against the newspaper, claiming that parts of the report meant that she had committed adultery and perjury. The newspaper by its defence pleaded (in paragraph 6) that the occasion of the publication was privileged in that the words complained of formed part of a fair and accurate report of judicial proceedings publicly heard before a court of competent jurisdiction in Switzerland, published contemporaneously.

On an order made under R.S.C., Ord. 25, r. 2, for the preliminary determination of the point whether paragraph 6 disclosed a defence in law:—

Held, (1) that there was no qualified privilege of a general or "blanket" character attaching to fair and accurate reports of judicial proceedings in foreign courts, since the reasons for the existence of such privilege attaching to reports of English judicial proceedings, based on the close concern of the whole British public in the administration of the law under which they live, were not readily applicable nor transferable to reports of foreign judicial proceedings (post, p. 563).

Risk Allah Bey v. *Whitehurst* (1868) 18 L.T. 615; *Riddell* v. *Clydesdale Horse Society* (1885) 12 R. 976; 22 S.L.R. 657; and *Pope* v. *Outram & Co. Ltd.* 1909 S.C. 230 considered.

But (2) that qualified privilege attached to this particular report, for its subject-matter was closely connected with the administration of justice in England and was, therefore, of legitimate and proper interest to the English newspaper-reading public. The foundation of all privilege was the public interest (post, p. 563), in the sense of a legitimate and proper interest as opposed to an interest due to idle curiosity or a desire for gossip (post, p. 570). Where such an interest could be shown, there was such privilege for a newspaper report of foreign judicial proceedings (post, p. 565).

(3) That privilege also covered the statements of which the plaintiff complained since they were germane and not extraneous to the matters of public interest, having a direct bearing on the reported confession (post, p. 570).

Accordingly, paragraph 6 of the newspaper's defence disclosed a defence in law.

Semble, that qualified privilege attaches to fair information on a matter of public interest so defined (post, p. 565).

Cox v. *Feeney* (1863) 4 F. & F. 13, N.P.; *Allbutt* v. *General Council of Medical Education and Registration* (1889) 23 Q.B.D. 400; 5 T.L.R. 651, C.A.; *Perera* v. *Peiris* [1949] A.C. 1; 64 T.L.R. 590, P.C.; and *Rex* v. *Rule* [1937] 2 K.B. 375; 53 T.L.R. 720; [1937] 2 All E.R. 772, C.C.A. considered.

PRELIMINARY POINT OF LAW under R.S.C., Ord. 25, r. 2.

The plaintiff, Cynthia Mary Webb, a widow, brought an action against The Times Publishing Co. Ltd., claiming damages for alleged libel contained in the issue of "The Times" newspaper of September 25, 1959.

Paragraph 1 of her statement of claim stated that: "At all "material times in the years 1948, 1949 and 1950, the plaintiff "was lawfully married to Brian Donald Hume." That was admitted in the defence. Paragraph 2 of the statement of claim stated that: "In the month of January, 1950, Brian Donald "Hume was tried at the Central Criminal Court for the murder of "Stanley Setty. The plaintiff gave evidence for Hume at his "trial and in the course of giving her evidence swore as the fact "was that she had never met Setty in her life. Hume was not "convicted of murder." That paragraph also was admitted in the defence.

Paragraphs 3 and 4 stated: "3. On June 5, 1958, the plaintiff "brought an action for libel against, amongst others, Sunday "Pictorial Newspapers (1920) Ltd. in respect of the publication in "the 'Sunday Pictorial' newspaper of Hume's 'confession' of "how he had murdered Setty, in which Hume said that Setty "had been meeting the plaintiff and himself socially, and that he "had heard stories of secret meetings between the plaintiff and "Setty. 4. On May 15, 1959, it was stated in open court "before Finnemore J. that Sunday Pictorial Newspapers (1920) "Ltd. and the editor of the 'Sunday Pictorial' had undertaken "not to republish the passages complained of and had agreed to "pay a sum by way of damages to the plaintiff and to pay her "costs, and that the plaintiff was content that the action against "them should be stayed on those terms. The said statement in "open court was published in 'The Times' newspaper and "received wide publicity in other newspapers." It was said in paragraph 2 of the defence: "The defendants admit that in the "issue of 'The Times' for May 16, 1959, they published a report "of the proceedings before Finnemore J. referred to in paragraph 4 of the statement of claim, and they will refer to the "said report for its full terms and effect. Save as aforesaid no "admissions are made in respect of any of the allegations contained in paragraph 3 or 4 of the statement of claim." Paragraph 5 of the statement of claim stated: "The defendants "are and were at all material times the printers and publishers "of 'The Times' newspaper." That was admitted in the defence. Then paragraph 6 of the statement of claim stated:

“In the issue of ‘The Times’ newspaper for September 25, 1959, the defendants falsely and maliciously printed and published of the plaintiff the following words: ‘Hume admits killing Stanley Setty. Body dismembered and thrown from aircraft. Winterthur, Switzerland, September 24. Donald Brian Hume, who is on trial on a charge of murdering a Swiss taxi driver, told the court here today that he robbed the Midland Bank in Brentford, London, and shot a clerk. He also admitted killing Stanley Setty, a car dealer, out of jealousy, sawing off his limbs and making them into parcels to be dropped from an aircraft. . . . Asked if he was married and had a child Hume replied “Yes, but it was not mine. The father was Stanley Setty.” ’ ”

Paragraph 7 stated: “By the said words the defendants meant and were understood to mean that the plaintiff had committed adultery with Setty, and had given perjured evidence at the trial of Hume for the murder of Setty at the Central Criminal Court. 8. The plaintiff will rely on the facts set out in paragraphs 1 to 4 hereof inclusive, and on the natural meaning of the words complained of in paragraph 6 hereof in support of the meanings alleged in paragraph 7 hereof. 9. By reason of the premises the plaintiff has been brought into hatred, scandal and contempt,” and “The plaintiff claims . . . damages.”

The corresponding paragraphs of the defence were paragraphs 4 and 5, where the defendants admitted the publication, but did not admit that the publication was “of the plaintiff,” nor that the words meant what was alleged or had or could have any defamatory meaning. These were more or less formal pleas.

Paragraph 6 of the defence—the vital paragraph—was as follows: “On September 24, 1959, before a criminal court of competent jurisdiction sitting at Winterthur, Zurich, in the Republic of Switzerland, the trial commenced of one Donald Brian Hume, a British citizen of the United Kingdom, on five indictments including charges of murdering a taxi driver, attempted murder of a bank official and armed robbery of a bank. The said Hume had, in or about January, 1950, been tried at the Central Criminal Court in the City of London on an indictment charging him with the murder of one Setty, whose dismembered body had been found in a marsh in Essex in or about October, 1949. The jury had failed to agree on a verdict on such indictment and subsequently the prosecution accepted a plea of guilty by the said Hume to being an accessory after "the fact to the murder of the said Setty and the said Hume "was sentenced to a term of 12 years' imprisonment. On his "release after serving the said sentence the said Hume wrote an "article for publication in the press in which he admitted having "murdered the said Setty. At the time of his arrest in Switzer-"land on the charges above referred to, the said Hume was "wanted by the police in the United Kingdom on charges of "attempted murder and armed robbery of a bank in Brentford, "in the County of Middlesex. The said words complained of in "paragraph 6 of the statement of claim formed part of a fair "and accurate report of the aforementioned judicial proceedings "publicly heard before the said court of competent jurisdiction "sitting at Winterthur, Zurich, and were published contem-"poraneously with such proceedings. In and by reason of the "premises the occasion of the said publication complained of was "privileged."

Paragraph 8 of the defence stated: "In the body of "the said report in 'The Times' containing the said words "complained of and immediately following the words: 'The "'father was Stanley Setty,' the defendants printed and pub-"lished in the form of a sub-title in large print the words "'Former Wife's Denial' and then the following words: 'Mr. "'David Jacobs, of M. A. Jacobs & Sons, Solicitors, of Pall Mall, "'London, last night issued the following statement: "I have "'"been asked by Mrs. Cynthia Webb, formerly the wife of "'"Mr. Brian Donald Hume, who is at present on trial in "'"Switzerland for murder, to say that the statement alleged "'"to have been made by Hume during the course of his trial "'"to the effect that Setty is the father of his child is completely "'"untrue and Mrs. Hume, as she then was, gave evidence at "'"the Central Criminal Court, when in 1950 Hume was on "'"trial for the murder of Stanley Setty, that she had never met "'"Setty in her life. In 1951 Mrs. Webb's marriage with Hume "'"was dissolved on the ground of her husband's cruelty and he "'"is the father of her child."'"

By her reply the plaintiff stated, inter alia: "(1) The plaintiff "joins issue upon the defence"; and "(2) Paragraph 6 of the "defence discloses no defence in law."

On January 18, 1960, on the application of the parties under R.S.C., Ord. 25, r. 2, Master Lawrence ordered that there should be a preliminary determination of the point of law whether paragraph 6 of the defence disclosed a defence in law, and the point was set down for trial. He ordered that the costs of and occasioned by the application should be costs in the cause.

T. G. Roche Q.C. and *Peter Bristow* for the plaintiff. Three kinds of privilege attach to judicial proceedings in England: the absolute common law privilege of those taking part; the statutory privilege of the reporter, originally under section 3 of the Law of Libel Amendment Act, 1888, extended by the Defamation Act, 1952, s. 7, and Part I of the Schedule, to certain Dominion and international courts and other tribunals, but not to foreign courts; and the common law qualified privilege for a fair and accurate report of English judicial proceedings of any kind, which is enjoyed by everyone, is not greater for a newspaper than for any member of the public, and in relation to which the circumstances of publication rebut the presumption of malice in law. The court here is concerned only with the third category of qualified privilege.

It is well settled that for a fair and accurate report of English judicial proceedings, as for reports of parliamentary proceedings, privilege is automatically conferred. [*Adam* v. *Ward*[1]; *Salmon* v. *Isaac*[2]; *MacDougall* v. *Knight*[3] and *Furniss* v. *Cambridge Daily News* (*No. 2*)[4] were referred to.] The basis of that privilege is stated in *Rex* v. *Rule*,[5] citing *Harrison* v. *Bush*,[6] namely, that there shall be an interest or duty in the publisher to publish, and an interest or duty in the publishee to receive. Nowadays the element of interest must be a legitimate as opposed to a mere news interest. The legitimate interest in relation to English judicial proceedings is the administration of justice which concerns us all as political beings who have a right to be present in court and to know and, if necessary, correct, the system of law under which we live. The common law, in conferring this privilege, has done so on balance of convenience, weighing the possible injury to the individual who may be slandered in such reports as against the vital public interest, and has come down on the side of public interest: *Rex* v. *Wright*.[7] It has also taken into account the control exercised by judges.

But it is not the law of England that reports of proceedings of

[1] [1917] A.C. 309; 33 T.L.R. 277, H.L.

[2] (1869) 20 L.T. 885.

[3] (1889) 14 App.Cas. 194; 5 T.L.R. 390, H.L.

[4] (1907) 23 T.L.R. 705, C.A.

[5] [1937] 2 K.B. 375, 379; 53 T.L.R. 720; [1937] 2 All E.R. 772, C.C.A.

[6] (1855) 5 E. & B. 344, 348.

[7] (1799) 8 T.R. 293, 298.

all foreign courts, or even of all Swiss courts sitting in public, have a similar protection, and the reasons are that the legitimate interest is lacking and the safeguards of English procedure and the control of the judges are also lacking. The Porter Committee in its report to Parliament (Report of the Committee on the Law of Defamation: Cmd. 7536, October, 1948) gave its reasons on grounds of public policy why the privilege should not extend to reports of foreign proceedings: see paras. 106–108. That report is relied on as persuasive authority—Lord Porter being a distinguished lawyer who is now dead—as showing that no such privilege extended to foreign courts when the committee considered the matter, and that no such extension was recommended, because foreign courts vary infinitely in their trial and procedure.

[*Gerald Gardiner Q.C.* (for the defendants) objected formally that the report was not admissible on the state of the law merely because one lawyer on a committee, the majority of which consisted of laymen, was dead.]

[PEARSON J. I should like to look at it as a matter of interest, and it may be relevant on the question of public policy, but I shall not regard it as binding authority.]

Roche Q.C. The report is adopted as part of the submissions for the plaintiff. It was published by command of Parliament after an inquiry into the law of libel for the purpose of recommending changes in that law. That report was followed by the Defamation Act, 1952, which is relied on as showing that such privilege as was granted by section 7 and Part I, paragraph 4, of the Schedule did not exist before the Act. If the defendants are right in their plea, Parliament was wasting its time in so extending privilege, for reports of those courts would already have possessed a wider privilege than the Act of 1952 conferred.

If the law of England were so rash as to extend privilege to the reports of all foreign judicial proceedings, such a decision could not be supported on the authorities which have now settled the principles of this branch of the law. It is obvious that there may be foreign courts in which torture or drugs are used, or there may be propaganda or political trials where so-called judicial bodies may take advantage of the privilege to publish matters grossly defamatory of individuals, quite untrue and completely irrelevant to the matter under consideration.

[PEARSON J. Statements of great public interest may be made abroad, as, for instance, an attack by Hitler in 1939 on the President of Czechoslovakia. It is of importance that the British public should know of such statements, even if they are not true.]

Such statements are not covered by the defence in paragraph 6.

[PEARSON J. It has a bearing on how wide the privilege should be.]

If the defendants concede that as a matter of general law no general privilege covers all proceedings of foreign courts but claim that these particular facts were of interest to the British public, those facts do not include the words of which the plaintiff particularly complains. What conceivable interest could the nation as a whole have in the matrimonial affairs of an unfortunate widow and the legitimacy of her daughter other than the natural desire of a newspaper to publish sensational bits of news, irrespective of whether they are true or not? In *Allbutt* v. *General Council of Medical Education and Registration*,[8] it was held that the whole nation had an interest to know the grounds of the council's decision, and that there was a duty to publish; by contrast, in *Chapman* v. *Ellesmere*[9] a report in "The Times" of a racing trainer being warned off the course was held not to be privileged since it was not of national interest. In *Perera* v. *Peiris*,[10] which is cited with reserve as a decision on Roman-Dutch law, Lord Uthwatt,[11] giving the decision of the Judicial Committee, said that in matters other than reports of judicial or parliamentary proceedings it was necessary to show not only the status of the tribunal on which the report was made but also that the subject-matter was of legitimate concern to the public.

If the facts of this particular trial are relied on as matters of legitimate interest to the British public as a whole, one would have expected the pleader to set out the particular matter of interest and duty, as is usually done where there is a defence of "fair and accurate report"; but that is not pleaded here. And it cannot be said that an obviously gratuitous slander by Hume on his wife and child, repeated by "The Times" as a libel, is a matter of public concern to the people of England. Even if there were a defence that it was of public interest that Hume was convicted in Switzerland, his views on the plaintiff's chastity were not germane and appropriate to that matter, and it follows that the particular words complained of are in any event outside even the narrower privilege which attaches to a report of a tribunal with an appropriate status and subject-matter.

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[8] (1889) 23 Q.B.D. 400.

[9] [1932] 2 K.B. 431; 48 T.L.R. 309, C.A.

[10] [1949] A.C. 1; 64 T.L.R. 590, P.C.

[11] [1949] A.C. 1, 21.

Should the defendants seek to rely on the English decision of *Risk Allah Beh* v. *Whitehurst*[12] or on the two Scottish decisions of *Riddell* v. *Clydesdale Horse Society*[13] and *Pope* v. *Outram & Co. Ltd.*[14] it should be noted that in none of those cases—two of which were in interlocutory proceedings—was the present point argued, and it is impossible to say that they were decided on the broad ground that nation-wide publication of the proceedings of any foreign court was privileged, or on the more limited ground that publication of the particular matter was legitimate. In any event, Scottish decisions do not assist on points of English common law, since the origin of the law of the two countries is different and the law is not the same.

Gerald Gardiner Q.C. and *Helenus Milmo* for the defendants. Though the defendants would be very pleased if the court were to hold that a fair and accurate contemporaneous report of judicial proceedings publicly heard in any country in the world was the subject of qualified privilege at common law, it is appreciated that our common law develops slowly, and that there may be reasons why such privilege should not apply to the courts of every foreign country. It is not, however, necessary for the determination of this preliminary point to make so wide a submission.

The narrower proposition here contended for is that at the present day a fair and accurate report of judicial proceedings publicly heard before a Swiss court is the subject of qualified privilege, and that that form of privilege extends to all such reports from Western European countries. Support for that submission is to be found from a consideration of the historical development of the law of privilege. The foundation of all privilege is the public interest. It is to the public interest, at a time when the world is getting smaller, when there is greater facility for travelling, especially to countries of Western Europe, when there is an increase in international commerce and crime, and when the courts of such countries are accessible to the English public, any one of whom may be personally involved in foreign proceedings at any time, that a report of any proceedings publicly heard in a Swiss court, whether civil or criminal, should be protected. In this particular report there appears an Englishman who is the subject of a serious charge in Switzerland. In no case where privilege applies has the court ever said that while a report of the proceedings as a whole is privileged a particular remark by

[12] (1868) 18 L.T. 615.

[13] (1885) 12 R. 976; 22 S.L.R. 657.

[14] 1909 S.C. 230.

a particular witness is to be excluded. That would create an impossible position for the reporter and might result in an unfair and inaccurate report.

The cases on privilege tend to fall into a series of boxes: see Gatley on Libel and Slander, 6th ed., p. 16; but there is only one law of qualified privilege. This report falls into the box of qualified privilege which extends, or ought to extend, to fair and accurate reports of judicial proceedings abroad, or at least in Western European countries.

Originally the only defences to an action for defamation were that the words were not defamatory or did not refer to the plaintiff or were true. Then the courts realised as a matter of common sense that there were cases in which it was contrary to public interest that a man, saying what he honestly believed, provided it was without malice, should be penalised; and it was established that the circumstances of publication rebutted the presumption of malice which the law had implied from the mere fact that an untrue defamatory statement had been published.

The tendency of the courts and of the legislature in this branch of English law has been to give a greater measure of freedom of expression to the citizen. In the last century, for instance, prosecutions for criminal libel were frequent; now they are almost extinct. All the reasons given for conferring this greater freedom apply equally to reports of foreign proceedings heard publicly in the twentieth century, with the possible exception of the reason that if English people do not like what they hear in court they can get the law altered, or get the judge to rule, and they cannot do that with regard to foreign proceedings.

When the English courts first considered the question whether qualified privilege should cover reports of English judicial proceedings, judicial notice was taken of the fact that newspapers had been reporting cases for years, despite the fact that such reports, whether civil or criminal, almost always involved defamatory statements about individuals. The court is now asked to "adapt itself to the usages of society" in the same way, and to take judicial notice of the fact that newspapers have for years reported interesting judicial proceedings publicly heard in the courts of foreign countries. As to the position of the parties incidentally defamed, which the court has always borne in mind, it has been said on more than one occasion that it is better for the parties that there shall be a fair report of a hearing in court rather than rumours.

The court should also consider the position if there were no privilege at all. As *Chapman* v. *Ellesmere* [15] shows, it has never been a defence for a newspaper to say that it was merely reporting what somebody else had said, and the position would be that no newspaper could safely report any foreign trial since it might always be faced with an action by a gold-digging plaintiff and would have no defence at all. No trials would be reported; and that was one of the considerations which led the courts to decide in relation to English judicial proceedings that it was better that the privilege should exist.

If the present case does not fall into the existing category of a fair and accurate report of judicial proceedings publicly heard, it would be submitted that it is something about which the public should be informed. The circumstances of this publication rebut the presumption of malice. The report in "The Times" newspaper of these Swiss proceedings did not seek to vilify the plaintiff or the man who was being tried.

Considering the authorities on qualified privilege chronologically, *Curry* v. *Walter* [16] held that an action could not be maintained for publishing a true account of judicial proceedings, however injurious such report might be to an individual. *Rex* v. *Wright* [17] decided the position in regard to parliamentary reports before statutory privilege was conferred on them; and Lawrence J.[18] there said that the advantage to the community of such reports was greater than the detriment to the individual who might be defamed. [*Stiles* v. *Nokes* [19] and *Oliver* v. *Bentinck* [20] were also referred to.] Lord Campbell's Libel Act of 1843 followed, conferring qualified privilege, but was never much used. *Taylor* v. *Hawkins* [21] decided that the circumstances of publication rebut the presumption of malice. *Andrews* v. *Chapman* [22] first referred to the value of fair and accurate reports since everyone cannot be present in court. [*Eastwood* v. *Holmes* [23]; *Lewis* v. *Levy* [24] and *Adams* v. *Ward* [25] were referred to.] In *Woodgate* v. *Ridout* [26] Cockburn C.J.[27] said that the administration of justice was a matter of public concern. The question here is

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[15] [1932] 2 K.B. 431, C.A.
[16] (1796) 1 B. & P. 525.
[17] 8 T.R. 293.
[18] Ibid. 298.
[19] (1806) 7 East 493.
[20] (1811) 3 Taunton 456.
[21] (1851) 16 Q.B. 308, 321.
[22] (1853) 3 C. & K. 286, 289.
[23] (1858) 1 F. & F. 347.
[24] (1858) E.B. & E. 537.
[25] [1917] A.C. 309.
[26] (1865) 4 F. & F. 202.
[27] Ibid. 217.

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whether the position is similar in regard to foreign courts; but it is to be noted that in none of the authorities cited has it ever been said that the privilege is limited to English courts of justice. [*Wason* v. *Walter*[28]; *Cox* v. *Feeney*[29]; *Salmon* v. *Isaac*[30] and *Henwood* v. *Harrison*[31] were also referred to.] The Newspaper Libel and Registration Act, 1881, by section 2, created a privilege for reports of public meetings made without malice. By that date it had been settled that privilege attached to judicial proceedings, including those before commissioners in lunacy, a judge in chambers, Chancery proceedings, and—after much argument—ex parte proceedings before magistrates. The Law of Libel Amendment Act, 1888, by section 3, provided that a fair and accurate report in a newspaper of judicial proceedings should be privileged. Two odd points may be noted about that section: first, until 1952 it had been neither argued nor decided whether the expression "any court exercising judicial authority" was confined to this country: the Defamation Act, 1952, answers that question affirmatively; secondly, it had never been raised, much less decided, whether the word "privilege" in section 3 meant qualified or absolute privilege. Mr. Roche says that it means "absolute"; so does Gatley; but Odgers on Libel, which is the senior authority, and Sir Hugh Fraser in 7 Law Quarterly Review (at pp. 158, 161) take the view that it means only qualified privilege. [Spencer Bower on The Law of Actionable Defamation, 2nd ed., pp. 110, 121 and 126 to 129, was also referred to.]

[PEARSON J. That point is still undecided even since the Act of 1952?]

Yes; a defendant newspaper, however, seldom pleads the Act of 1888, for plaintiffs seldom allege personal malice against a newspaper.

Support for the submission that qualified privilege extends to reports of foreign judicial proceedings is to be found in an express English decision—*Risk Allah Bey* v. *Whitehurst*[32]—and in the two Scottish decisions of the Court of Session—*Riddell* v. *Clydesdale Horse Society*[33] and *Pope* v. *Outram & Co. Ltd.*[34] In *Riddell's* case[35] the question whether a report of judicial proceedings published in the United States was privileged was plainly raised, and it was decided that the privilege attached to reports of courts other than Scottish courts; the same position was accepted in *Pope* v. *Outram & Co. Ltd.*[36] in relation to a report of American divorce proceedings. When it is said that those cases do not bind an English court because Scottish law is different from English law, the answer is that in relation to the present matter Scottish law is the same as English law: see Encyclopaedia of the Laws of Scotland, para. 189. Though one member of the court (Lord Deas) in *Richardson* v. *Wilson*[37] said that the law of libel in Scotland and England was different, that was only on the point whether a Scottish summons was the same as our statement of claim. That comment does not entitle this court to disregard those two Scottish decisions, even though they were in interlocutory proceedings and the present point was not argued, probably because the distinguished lawyers for the plaintiffs did not think it worth arguing. In *Abbott* v. *Philbin* (*Inspector of Taxes*)[38] Lord Evershed M.R. said recently that though he did not wholly accept a Scottish decision on the construction of an Act of Parliament there under consideration, it would not be right for the English Court of Appeal to express a diametrically opposite view from that of the Court of Session. *Risk Allah Bey's* case[39] should be followed, as a decision, based on the agreement of the lawyers, that whether or not a defence of fair and accurate report applied to reports of all foreign proceedings, it did apply to a report of a trial in Brussels for the murder of an Englishman. Equally, it applies to a report of a trial in Zurich of a notorious Englishman who had been tried in England for murder and acquitted, and was wanted by the police in this country at the time of the trial in Zurich.

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[28] (1868) L.R. 4 Q.B. 73.
[29] (1863) 4 F. & F. 13.
[30] (1869) 20 L.T. 885.
[31] (1872) L.R. 7 C.P. 606.
[32] (1868) 18 L.T. 615.
[33] 22 S.L.R. 657.
[34] 1909 S.C. 230.
[35] 22 S.L.R. 657.

[PEARSON J. Is it a special feature of this case that it was the report of the trial of an Englishman? One might hesitate before saying that any proceedings before any foreign court were privileged, for it is difficult to see where to drawn the line. There may be a difference where legal proceedings are used for propaganda purposes or for defaming some particular individual.]

Political trials abroad, which appeared to cause some difficulty to the Porter Committee, should be excepted. Objection has been taken to reliance on the Porter Committee's report, but if it is citable at all, it should be noted that this particular matter as to whether there should be a statutory privilege for reports of foreign judicial proceedings occupies three out of 226 paragraphs and was obviously a minor point.

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[36] 1909 S.C. 230.

[37] (1879) 7 R. 237, 242.

[38] [1960] Ch. 27, 49; [1959] 3 W.L.R. 739; [1959] 3 All E.R. 590, C.A.

[39] 18 L.T. 615.

[PEARSON J. The committee were concerned with recommendations for legislation. It was not their object to ascertain what the common law was but what the statute should be; and they said that reports of foreign courts were too difficult and statutory recommendations could not be made in respect of them?]

Yes; it is clear that the committee would have liked to give statutory protection to such reports, but considered that Parliament might find it difficult and invidious politically to distinguish between one country and another, and that a general privilege conferred by statute would be impracticable.

[PEARSON J. But the report does afford an argument—on grounds of public policy rather than law—against too wide a recognition of any general privilege for reports of foreign judicial proceedings.]

The defendants would like it to be as wide as possible. If there is no general privilege a law publisher would have to obtain from anyone to whom he sold a volume of the American law reports a certificate showing that he was a genuine student of American law. No publisher would take such a risk.

Finally, since the legal ground of qualified privilege is that the circumstances of publication rebut the presumption of malice, the court is asked to say that where a reputable newspaper such as "The Times" publishes that which for the purposes of this preliminary point is agreed to be a fair and accurate report, and the words complained of particularly formed part of such report, the court should conclude that the presumption of malice is rebutted and decide the preliminary point in favour of the defendants.

Roche Q.C. in reply. The court may decide the present point in four possible ways: first, that reports of all foreign proceedings all over the world have a general or "blanket" privilege. That should be rejected out of hand, for though some might think it desirable that the common law should extend protection in that way, no authority has been cited which establishes the existence of such extended privilege; and if Parliament wishes to confer it Parliament must legislate. They had the matter before them as recently as 1952, knowing the terms of the Porter Committee report, and they decided not to extend it.

That there cannot be such "blanket" protection is obvious as soon as such a proposition is examined in detail. There may be foreign courts under martial law rule; presided over by illiterate judges, with no settled form of procedure, and with sentences pronounced after nothing more than a police statement. If an English magistrate behaved in that way it could be reported to the Lord Chancellor; but no such control exists over a foreign court. Newspapers naturally want this " blanket " protection so that they can publish anything defamatory without having to show that it is in the public interest to do so; but the court ought not to give them that protection.

Secondly, the court may say that reports of some foreign courts have a " blanket " protection, and what has been suggested is that it extends to any proceedings, civil or criminal, publicly heard in Western Europe. That is said to be a rule of law. But what is Western Europe and what are its geographical limits? Is the rule determined on purely geographical lines? Or is it determined on political lines and does it vary from time to time? Spain, for instance, is in Western Europe; but did privilege apply during the monarchy, the civil war, or the Franco régime? What about a country like Turkey where there has recently been a *coup*? What about Germany under the Nazi régime?

[PEARSON J. A report of the Reichstag Fire Trial might raise the issue neatly.]

There is no authority for that which is said to be a rule of law nor any way of stating it. How can there be a principle of law incapable of being stated? What are the tests? If one decides according to the complexion of a government, can one say that the courts of monarchies and republics but of no communist states enjoy this blanket protection? Do countries suddenly change from privileged to unprivileged according to a change of government? The English courts are not entitled to go into questions of politics or governments once our Parliament has recognised them. If there were such a rule as is alleged by the defendants it would have to include the lowest magistrates' court in Spain, however staffed, and would exclude the courts of every British dominion and colony except Gibraltar and Malta and also the Supreme Court of the United States. If the test is the efficiency of the judges, how is that tested? Does the court have to inquire into the substantive law and whether it is good or bad? But who are we to judge what is good or bad law? Do we judge their procedure? Immediate difficulties arise; for some nations are federal and the law varies between one state and another;

procedure may vary even between court and court. As soon as the first alternative of universal privilege is discarded, lines have to be drawn, and the defendant must then prove the facts which bring him within the more limited privilege. There is no evidence here that Switzerland is a good country, or that its courts or its law or its procedure is good or like our own. If the defendants had elected to plead that Swiss law was the same as English law—foreign law being a question of fact—one would only have had to read the report complained of to see that Swiss procedure is wholly different from our own, and lacks a fundamental protection afforded by an English court in relation to previous convictions of an accused person. If the judge of a foreign court can open up any field of inquiry the possibility of witnesses making defamatory statements is greatly increased.

[Pearson J. The rule would have to be the other way round. The privilege would apply to foreign courts unless there was something wrong with them; but the question of onus of proof would then become difficult.]

It would be contrary to our law of libel as it has developed, for it is settled that it is for the defendant to prove that there is a common interest. If that depends in any way on the propriety of the court the onus would be on the defendant to prove it. When the courts were asked in the first quarter of this century to hold that the confiscatory legislation of Soviet Russia was contrary to public policy, they declined to do so on the ground that matters of that kind were for the sovereign parliament to decide. Similarly, if the courts of this country were to start holding that the judicial procedure of friendly sovereign states was contrary to public policy, that would be against the comity of nations and might even become a casus belli. There may well be cases in which a court is only a sham; but our courts cannot investigate foreign procedure.

Thirdly, the court may hold that reports of some foreign proceedings have a "subject" protection, within the decision in *Perera* v. *Peiris*,[40] when it must be shown that the nation as a whole has a legitimate interest in the subject-matter, and also that what was published was germane to that matter. If, for instance, a New York court makes a finding in a commercial case against a master of a ship and decides a point of general importance to the British shipping community, the decision, including the finding against the master, could be published in Lloyd's List

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[40] [1949] A.C. 1.

Reports under the "subject-matter" privilege, and the master would be met by that defence in any action he might bring for libel against the publisher, for the finding against him would be germane to the matter of national legitimate interest. But the fact that the accused in the present case was an Englishman does not give the whole of England a legitimate interest in what he said in any foreign court.

[PEARSON J. He was a man found not guilty in England of a murder to which he later confessed in the Swiss court. Is there not a matter of interest to the nation to consider the efficiency of English justice?]

That is not what is complained of. Even if there is involved a criticism of the administration of English justice, that has nothing to do with the private life of the plaintiff.

The words here complained of fall into the fourth possible category of decision, that of reports which have no protection at all.

[PEARSON J. But the words complained of give the alleged reason for murdering Setty, namely, jealousy, even if the whole statement is untrue.]

The defendants cannot show that it was of legitimate interest to the whole nation that Hume said that his former wife was an adulteress. The law of libel is to protect reputations against false and slanderous statements. Certain cases are exceptions to that rule, but this is not one of them. A newspaper has no right to report defamatory statements of this kind; and the defendants have failed to make out the defence pleaded in paragraph 6. [*Law* v. *Llewellyn*[41]; *Belt* v. *Lawes*[42]; *Anderson* v. *Gorrie*[43]; *Kimber* v. *Press Association*[44]; and *Dawkins* v. *Lord Rokeby*[45] were also cited.]

Cur. adv. vult.

June 2. PEARSON J. read the statement of claim and the defence as set out above, said that what he had to decide was the preliminary point whether paragraph 6 of the defence—the vital paragraph—disclosed a defence in law, and continued: Now returning to paragraph 6 of the defence, I find that there are certain inferences which can reasonably be drawn: (1) At the second trial of Hume, the charge of murder must have been

[41] [1906] 1 K.B. 487, C.A.

[42] (1882) 51 L.J.Q.B. 359.

[43] [1895] 1 Q.B. 668; 10 T.L.R. 660, C.A.

[44] [1893] 1 Q.B. 65; 9 T.L.R. 6, C.A.

[45] (1875) L.R. 7 H.L. 744.

disposed of somehow, and presumably the prosecution offered no evidence on this charge, and the jury returned a formal verdict of not guilty. (2) Hume was sentenced in the year 1950 to 12 years' imprisonment for being an accessory after the fact to murder, but he was again at liberty for some time before the Swiss trial in September, 1959, and presumably he received remission of approximately one-third of his sentence, and was therefore released in the year 1958. (3) The charges of attempted murder and armed robbery of a bank in England, and the charges of murdering a taxi driver, attempted murder of a bank official, and armed robbery of a bank in Switzerland, should be understood as referring to recent offences alleged to have been committed by Hume after his release from prison in the year 1958.

Those inferences do not materially alter the effect of paragraph 6 of the defence, but they make it possible to summarise the effect more shortly, bringing out the most material factors as follows: (a) Hume was at all material times a British subject of the United Kingdom. (b) He was in the year 1950 put on trial in an English court for the murder of Setty, and was eventually found not guilty. (c) He had, however, pleaded guilty to a charge of being an accessory after the fact to murder, and was sentenced to 12 years' imprisonment, and, after receiving a remission of sentence, was released in the year 1958. (d) In the year 1959 he was wanted by the English police on charges of attempted murder and armed robbery alleged to have been committed by him in England after his release. (e) In September, 1959, he was put on trial in a Swiss court on charges of murder, attempted murder, and armed robbery, alleged to have been committed by him in Switzerland in or about the year 1959. (f) His own answers given at the trial in the Swiss court in response to the judge's interrogation purported to show that he had in fact committed the murder of Setty, and also that, since his release, he had committed the crimes for which he was wanted by the English police. (g) The words complained of in paragraph 6 of the statement of claim formed part of a fair and accurate report of a public trial in the Swiss court of competent jurisdiction, and the report was published contemporaneously.

Owing to the form of the proceedings, which are in lieu of demurrer, Mr. Roche, for the plaintiff, had to open the argument, seeking to establish the negative proposition that paragraph 6 of the defence does not disclose any defence in law. Mr. Gardiner, for the defendants, had the positive proposition that the paragraph does disclose a defence in law. It is common ground that we are not at all concerned in this case with the absolute privilege which attaches at common law to anything said by parties, witnesses, counsel, solicitors, judges or jurors in the course of judicial proceedings; nor are we concerned at all with the statutory privilege (whether it be qualified or absolute) conferred by section 3 of the Law of Libel Amendment Act, 1888, as elucidated by section 8 of the Defamation Act, 1952, on a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority within the United Kingdom, if such report is published contemporaneously with such proceedings. Also we are not concerned in this case, except indirectly for the purposes of one particular argument, with the statutory qualified privilege conferred by section 7 of the Defamation Act, 1952, and Part I of the Schedule to that Act on reports of judicial proceedings in any international court or any court exercising jurisdiction throughout any part of Her Majesty's dominions outside the United Kingdom. The question with which we are concerned is whether there is qualified privilege at common law for this report of a foreign judicial proceeding.

Mr. Gardiner's primary contention for the defendants is that the publication of the words complained of is protected by qualified privilege simply by virtue of the facts stated in the sentence: "The said words complained of in paragraph 6 of the "statement of claim formed part of a fair and accurate report of "the aforementioned judicial proceedings publicly heard before the "said court of competent jurisdiction sitting at Winterthur, "Zurich, and were published contemporaneously with such pro-"ceedings." For this primary contention he does not bring in any of the other facts stated in paragraph 6 of the defence. He claims qualified privilege of a general, comprehensive character for any such report, whatever the subject-matter of the judicial proceedings may be. Mr. Roche coined the convenient phrase "blanket privilege" for this claim. Mr. Gardiner did, however, say that this claim does not necessarily cover courts in all foreign countries, and that it might be limited to courts in western European countries, or limited in some other way to some class of courts which would include the Swiss courts.

Mr. Gardiner also has a secondary contention, which is of much less general interest to his clients, that, if his primary contention is too wide, nevertheless on all the particular facts of the case as set out in paragraph 6 of the defence there is qualified privilege for this report of these foreign judicial proceedings.

Surprisingly, there is no direct authoritative decision—indeed, no decision of an English court—on the question or questions arising for decision in this case. In England there was the case of *Risk Allah Bey* v. *Whitehurst.*[1] I will read the first paragraph of the headnote: "The plaintiff was tried in "Brussels for murder and acquitted. A correspondent of an "English journal wrote letters which were inserted in such "journal, containing incorrect statements of the evidence, independent comments of the writer upon the character and bearing "of the prisoner, and expressions impugning the verdict of "acquittal, and implying that the prisoner should have been "found guilty of murder and was certainly guilty of forgery and "fraud. A leading article was also published adopting the same "tone." The plaintiff brought an action for libel. Evidently the plaintiff had a strong case on the merits, and, in the event, the jury returned a verdict in his favour for £960, which was a very large sum in those days. The trial in Brussels seems to have had no English feature except that the trial was for the murder of a young Englishman. It appears, however, that counsel for the plaintiff agreed with counsel for the defendants that the qualified privilege attaching to fair and accurate reports of judicial proceedings would apply to the report in the defendants' newspaper of the trial in Brussels, if that report were fair and accurate. The court was content to proceed with the trial and to direct the jury on that basis. In his summing-up Cockburn C.J. said[2]: "Now, I am glad to think that all parties are agreed as "to what is the law on the subject. Whatever may have been "thought in past times, nowadays we are agreed on this, that "fair and impartial reports of the proceedings in courts of "justice, although incidentally those proceedings may prejudice "individuals, are of so great public interest and public advantage, "that the publishing of them to the world predominates so much "over the inconvenience to individuals as to render these reports "highly conducive to the public good; but the conditions on "which the privilege can be maintained are, that the report shall "be fair, truthful, honest, and impartial. It need not be a report "of every word that passes upon a trial. No newspaper, however "large, could report the proceedings in the full extent to which, "upon a long trial, these proceedings necessarily extend. You "may either have it to the utmost possible extent the limits of "the paper will allow it to be given, or in the more condensed "form of a summary or epitome, but you must have the report

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[1] (1868) 18 L.T. 615.

[2] Ibid. 618.

"honest and fair. A paper may give a report of the proceedings "of courts of justice properly condensed and fair, but it is not "entitled, under pretence of giving a report, to add comments "of its own, or to display facts not brought forward in the "proceedings, but coming out of the reporter's own head. This "is admitted on all hands to be the state of law. Whether the "British public has a legitimate interest or curiosity in the "proceedings of a foreign tribunal, or in a British subject brought "before a foreign tribunal, is another matter, and I am glad "that this question does not arise today. They all agree that that "which a wise law applies to a report of proceedings in English "courts of justice shall apply to the court at Brussels." Clearly there was no decision of the court on the question of law. The most that can be said is that, plaintiff's counsel having for good tactical reasons conceded the point of law, the court was willing to proceed on that basis, and therefore presumably did not consider that the concession was manifestly wrong. There is no implication of a decision by the court that the concession was right in law.

Next there is a Scottish case, *Riddell* v. *Clydesdale Horse Society*.[3] I will read the headnote in the Scottish Law Reporter, which is fuller than the headnote in the Sessions Cases. "A society incorporated to aid in preserving the purity "of a breed of horses proposed to publish and circulate among "its members for their information a report of proceedings taken "before a court in America for the extradition of a party charged "with forging false pedigrees to be inserted in their stud book. "In these proceedings letters had been read which were the "property of a person in Scotland. These letters with the other "proceedings had been reported in the American newspapers at "the time. He sought interdict against the publication of the "letters and the report. Held, that the letters as well as the "proceedings having been published already in reports of what "took place in a public court, and it not being averred that the "report complained of was unfair or inaccurate, interdict could "not be granted. Observed that the publication of the report "along with an averment of malice might give rise to an action "of damages." The respondent claimed in effect qualified privilege for the report of the American judicial proceedings, in the course of which the material letters had been put in evidence and read. There was no argument on the question whether such privilege was applicable to foreign judicial proceedings. The court assumed and said that it was. The Lord President in his judgment said[4]: "The only question, therefore, turns upon this, "whether the report of the proceedings in the United States is "such a document or such a compilation as the respondents are "entitled to publish. That depends upon whether it is a fair and "accurate report of proceedings before a public court. I gather "from the commencement of the report itself that the proceedings took place before the commissioner specially authorised by "an order of the Circuit Court for the district of Illinois to hear "extradition cases. It appears very clearly that the court in "which these commissioners proceeded is a public court to all "intents and purposes—a court at which the proceedings are "conducted in the public interest, and at which the public are "entitled to be present. That being so, the only remaining "question is whether the report of these proceedings which it is "proposed to publish is an accurate and a fair report, and "certainly there is no relevant averment to the contrary."

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[3] (1885) 22 S.L.R. 657; 12 R. 976.

That is persuasive authority—not, in my view, binding authority—in favour of the defendants' contention that qualified privilege attaches to a fair and accurate report of, at any rate, some foreign judicial proceedings. However, as there was no argument on the other side, the weight of the decision as a persuasive authority is diminished. Also, there was no discussion or consideration as to what might be the proper scope or requisite conditions of the application of such privilege to foreign judicial proceedings.

There is also another Scottish case of *Pope* v. *Outram & Co. Ltd.*,[5] in which it was assumed, without any argument to the contrary having been advanced, that qualified privilege would attach to a fair and accurate report of judicial proceedings. The Scottish proceedings, however, were of an interlocutory character, concerned with points of pleading and the settlement of issues to be tried.

These Scottish cases are relevant and have to be taken into account in favour of the defendants' contention, but they are not conclusive.

On the plaintiff's side there is an argument based on certain provisions of the Defamation Act, 1952. If the defendants' main contention is right, fair and accurate reports of judicial proceedings in dominion and colonial courts or in international courts

[4] 22 S.L.R. 657, 659.

[5] 1909 S.C. 230.

already had qualified privilege at common law. Why then did the Act purport to confer such privilege on such reports? Plainly this would not have been done if there had been a confident opinion in government and legal circles that the reports already had the privilege. There are, however, two points to be noticed: First, there is section 7 (4), which says: " Nothing in this section " shall be construed as limiting or abridging any privilege sub- " sisting (otherwise than by virtue of section four of the Law of " Libel Amendment Act, 1888) immediately before the com- " mencement of this Act." That would preserve any common law privilege that there might be. Secondly, section 7 and the Schedule refer to a great many classes of proceedings other than and in addition to judicial proceedings. In my opinion, this argument based on the provisions of the Act does carry some weight in favour of the plaintiff's contention, but it is not conclusive.

Mr. Roche, for the plaintiff, also sought to use paragraphs 106, 107 and 108 of the Report of the Porter Committee on the Law of Defamation[6] as a persuasive authority in his favour. The committee included very eminent lawyers with wide experience of the law of defamation. Paragraphs 106, 107 and 108 give the committee's reasons for not recommending legislation to confer privilege on reports of foreign judicial proceedings. Mr. Gardiner took the objection that the Committee Report was not admissible as authority to show what the law is. In general, his objection is well-founded, but if and in so far as the present question has an aspect of public policy, the committee's reasons can be taken into account, but only as having some bearing on that policy aspect.

There is thus no short way to a decision in this case. I propose, in the first instance, to consider a number of cases in which qualified privilege has been held to apply to fair and accurate reports of judicial proceedings in this country, with a view to seeing whether the reasons that are given would lead to a similar ruling in relation to foreign judicial proceedings. That will be for the purpose of deciding whether the defendants' primary contention, the so-called " blanket " contention, can be accepted. If not, the secondary contention will have to be considered afterwards.

There is the case of *Wason* v. *Walter*[7] in 1868. Paragraph 1 of the headnote says this: "A faithful report in a public newspaper of a debate in either House of Parliament, containing "matter disparaging to the character of the individual which had "been spoken in the course of the debate, is not actionable at "the suit of the person whose character has been called in "question. But the publication is privileged on the same principle as an accurate report of proceedings in a court of justice "is privileged, viz., that the advantage of publicity to the "community at large outweighs any private injury resulting "from the publication." Then in the judgment of Cockburn C.J. there is a passage which is of particular interest as showing both the historical and highly technical explanation of the plea of privilege, and also the broader principle to which it can be ascribed. He says[8]: "It is now well established that faithful "and fair reports of the proceedings of courts of justice, though "the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the "publishers are neither criminally nor civilly responsible. The "immunity thus afforded in respect of the publication of the "proceedings of courts of justice rests upon a twofold ground. "In the English law of libel, malice is said to be the gist of an "action for defamation. And though it is true that by malice, as "necessary to give a cause of action in respect of a defamatory "statement, legal, and not actual malice, is meant, while by legal "malice, as explained by Bayley J. in *Bromage* v. *Prosser*,[9] "is meant no more than the wrongful intention which the law "always presumes as accompanying a wrongful act without any "proof of malice in fact, yet the presumption of law may be "rebutted by the circumstances under which the defamatory "matter has been uttered or published, and, if this should be "the case, though the character of the party concerned may have "suffered, no right of action will arise. 'The rule,' says Lord "Campbell C.J. in the case of *Taylor* v. *Hawkins*,[10] 'is that, if "'the occasion be such as repels the presumption of malice, the "'communication is privileged, and the plaintiff must then, if he "'can, give evidence of malice.' It is thus that in the case of "reports of proceedings of courts of justice, though individuals "may occasionally suffer from them, yet, as they are published "without any reference to the individuals concerned, but solely "to afford information to the public and for the benefit of society,

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[6] Cmd. 7536. October, 1948.

[7] (1868) L.R. 4 Q.B. 73.

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[8] L.R. 4 Q.B. 73, 87–88.

[9] (1825) 4 B. & C. 247, 255.

[10] (1851) 16 Q.B. 308, 321.

"the presumption of malice is rebutted, and such publications "are held to be privileged. The other and the broader principle "on which this exception to the general law of libel is founded "is, that the advantage to the community from publicity being "given to the proceedings of courts of justice is so great, that "the occasional inconvenience to individuals arising from it must "yield to the general good. It is true that with a view to "distinguish the publication of proceedings in Parliament from "that of proceedings of courts of justice, it has been said that "the immunity accorded to the reports of the proceedings of "courts of justice is grounded on the fact of the courts being "open to the public, while the Houses of Parliament are not; as "also that by the publication of the proceedings of the courts "the people obtain a knowledge of the law by which their "dealings and conduct are to be regulated. But in our opinion "the true ground is that given by Lawrence J. in *Rex* v. "*Wright*,[11] namely, that 'though the publication of such pro-"'ceedings may be to the disadvantage of the particular "'individual concerned, yet it is of vast importance to the public "'that the proceedings of courts of justice should be universally "'known. The general advantage to the country in having these "'proceedings made public, more than counter-balances the in-"'convenience to the private persons whose conduct may be "'the subject of such proceedings.' In *Davison* v. *Duncan*,[12] "Lord Campbell says: 'A fair account of what takes place in a "'court of justice is privileged. The reason is, that the balance "'of public benefit from publicity is great. It is of great conse-"'quence that the public should know what takes place in court; "'and the proceedings are under the control of the judges. The "'inconvenience, therefore, arising from the chance of injury to "'private character is infinitesimally small as compared to the "'convenience of publicity.' And Wightman J. says: 'The only "'foundation for the exception is the superior benefit of the "'publicity of judicial proceedings which counter-balances the "'injury to individuals, though that at times may be great.'"

Mr. Gardiner gave a very interesting historical survey of the cases relating to the privilege for reports of judicial proceedings, and I have collected from them five reasons assigned for that privilege. First, it is said that court proceedings are open to the public, and it follows that reports of them should be freely permitted. I have already referred to the passage in *Wason* v.

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[11] (1799) 8 T.R. 293, 298.

[12] (1857) 7 E. & B. 229, 231.

Walter.[13] There is also an older case called *Curry* v. *Walter.*[14] Then there is *Andrews* v. *Chapman*[15] and *Lewis* v. *Levy.*[16] Also there is a Scottish case, *Richardson* v. *Wilson,*[17] in which there is a convenient statement of this reason by the Lord President: "The publication by newspapers of what takes place "in court at the hearing of any cause is undoubtedly lawful; "and if it be reported in a fair and faithful manner the publisher "is not responsible though the report contain statements or "details of evidence affecting the character of either of the parties "or of other persons; and whatever takes place in open court "falls under the same rule, though it may be before or after the "proper hearing of the cause. The principle on which this rule is "founded seems to be that, as courts of justice are open to the "public, anything that takes place before a judge or judges is "thereby necessarily and legitimately made public, and being "once made legitimately public property, may be republished "without inferring any responsibility." That reason is not readily transferable to reports of foreign judicial proceedings. I do not know whether, for instance, an English tourist on holiday in Switzerland would be allowed to enter a Swiss court and listen to the proceedings, but I assume that he would be. Owing to his unfamiliarity with the language and the law and the procedure he would probably understand very little of what was going on.

Secondly, it is said in *Woodgate* v. *Ridout*[18]: "The reason "why comments upon the proceedings of courts of justice are "privileged is that the administration of justice concerns us all, "and that it is well that the conduct of the judge or jury should, "if necessary, be brought to the bar of public opinion, like all "other matters of public concern." That refers to comment, but the same point is mentioned in relation to reports in *Andrews* v. *Chapman,*[19] where Lord Campbell C.J. said: "The courts are "open to all, but they are of limited extent, and only a small "number of persons can be present in them; but by means of the "press the whole nation is informed of what takes place, and is "put in a position to form an opinion upon the conduct of the "jury, the judge and the witnesses."

That reason is not transferable at all to foreign judicial proceedings. For instance, the conduct of judges and of juries, if any, in Switzerland cannot usefully be brought before the bar of public opinion in England, and the British public has no concern with it, or responsibility for it, or power to take action with regard to it.

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[13] L.R. 4 Q.B. 73, 87–88.

[14] (1796) 1 B. & P. 525.

[15] (1853) 3 C. & K. 286.

[16] (1858) E.B. & E. 537, 558.

[17] (1879) 7 R. 237, 241.

[18] (1865) 4 F. & F. 202, 217.

[19] 3 C. & K. 286.

Thirdly, there is the education of the public as to the details of the administration of justice. It is of benefit to the public to learn about the administration of the law under which they live in the courts in which some of them will have to appear from time to time and play their parts as parties or witnesses or jurors. I have already read a passage from *Wason* v. *Walter*[20] in which this point was taken. Also in *Salmon* v. *Isaac*,[21] Hannen J. said: "It is for the public interest that facilities should be "afforded to the public for acquainting itself with the details of "the administration of the law. Accordingly, anyone is at liberty "to publish a fair report of proceedings in a court of justice, "although such report may contain matter damaging the "character of individuals. A newspaper has no greater privilege "in such a matter than any ordinary person—any person is "privileged in publishing such a report if he does so merely to "inform the public."

This reason has very little force in relation to foreign judicial proceedings. For instance, the average British citizen is not likely to encounter the Swiss law in any way, nor to appear in any capacity in a Swiss court.

Fourthly, it is pointed out that even the persons affected may well be better off with fair and accurate reports than with rumours circulating: *Oliver* v. *Bentinck*[22]; *Lewis* v. *Levy*.[23]

That reason has much less force in relation to foreign judicial proceedings than it has in relation to English judicial proceedings, as the rumours would have to travel to England.

Fifthly, and most important, there is what may be called the balancing operation—balancing the advantages to the public of the reporting of judicial proceedings against the detriment to individuals of being incidentally defamed. I have already read the passage in *Wason* v. *Walter*,[24] in which there are citations from other cases. There is also a passage in the judgment of Lord Campbell C.J. in *Lewis* v. *Levy*[25]: "The case of *Curry* v. "*Walter*[26] has been often criticised, but never overturned, "and often acted upon. And in *Rex* v. *Wright*[27] it received the

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[20] L.R. 4 Q.B. 73, 87–88.
[21] (1869) 20 L.T. 885, 886.
[22] (1811) 3 Taunton 456, 459.
[23] (1858) E.B. & E. 537, 561–562.
[24] L.R. 4 Q.B. 73, 87–88.
[25] E.B. & E. 537, 559.
[26] 1 B. & P. 525.
[27] 8 T.R. 293, 298.

"unqualified approbation of that great judge, Lawrence J., who "observed that, though the publication of such proceedings may "be to the disadvantage of the particular individual concerned, "yet it is of vast importance to the public that the proceedings "of courts of justice should be universally known. The general "advantage to the country in having these proceedings made "public more than counter-balances the inconveniences to the "private persons whose conduct may be the subject of such "proceedings."

It is at this point that the sum total of the differences between English and foreign judicial proceedings becomes crucial and decisive. As regards English proceedings, it is desirable to have a simple rule, and it is not unreasonable to say that all persons living in England have a real interest in, and are concerned with, anything that happens in any part of the country in the administration of their law in any of their courts. But it would be extravagant to say that the citizens of England have a real interest in, and are concerned with, the adjudication of some trivial and purely personal dispute in some minor court on the other side of the world. In carrying out the balancing operation due regard should be had to the interests of the individuals who may be incidentally defamed in a report of a judicial proceeding. It is one thing to take for the public benefit the risk of incidental defamation in the report of any English judicial proceedings. It would be quite another thing, much more serious, to take the risk of being defamed by the reporting of any judicial proceeding in any court in any part of the world.

Moreover, there are special matters which may increase the risk. Subject to certain exceptions, the general rule of English procedure, especially criminal procedure, is that the evidence is confined, so far as possible, to matters relevant to the issues in the case. But there is in some countries a different procedure, under which in criminal trials the accused is questioned about his past life and in particular his previous offences, as is shown by the matters complained of in this case. That procedure extends considerably the risk of incidental defamation of third parties.

Next, there is the possibility that the government of some country might misuse its courts of justice by staging a propaganda trial, in which the prosecutor and witnesses and perhaps even the accused, after suitable drilling, would vilify and defame the characters of the internal and external enemies of the government. That involves a large extension of the risk of incidental defamation.

Having regard to the matters that I have mentioned, which have a cumulative effect, and in the absence of any binding authority, I decide that there is no qualified privilege of a general or "blanket" character for fair and accurate reports of foreign judicial proceedings in any courts in any country.

As stated above, Mr. Gardiner said that his preliminary contention (that is, that there was qualified privilege of a general or "blanket" character) does not necessarily cover courts in all foreign countries; and it might be limited to courts in western European countries or limited in some other way to some class of courts which would include the Swiss courts. Mr. Roche in reply was able to show very convincingly that any geographical limitation was impracticable. It is not necessary to explain that at length. I suggested to Mr. Roche that the privilege might be confined in some way to genuine trials or properly conducted trials, but I was readily convinced by his answer to the effect that it would be impracticable and perhaps not in accordance with international comity for the courts of this country to embark on the task of inquiring into and deciding whether or not some trial in a foreign country was a genuine trial and properly conducted. In my judgment, the defendants' primary contention that there is for fair and accurate reports of foreign judicial proceedings qualified privilege of a general or "blanket" character must be rejected.

That conclusion, however, is not decisive of this case, because the defendants' secondary contention, based on the particular facts of the case, remains to be considered.

In my view, it was established by Mr. Gardiner's historical examination of the decided cases that originally and in principle there are not many different kinds of privilege, but rather for all privilege there is the same foundation of the public interest. The elasticity of this branch of the law was emphasised in *Wason* v. *Walter*.[28] I have already cited that case, but not this passage. It was there said: "Whatever disadvantages attach to a system "of unwritten law, and of these we are fully sensible, it has at "least this advantage, that its elasticity enables those who "administer it to adapt it to the varying conditions of society, "and to the requirements and habits of the age in which we live, "so as to avoid the inconsistencies and injustice which arise when "the law is no longer in harmony with the wants and usages "and interests of the generation to which it is immediately

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[28] L.R. 4 Q.B. 73, 93–94.

"applied. Our law of libel has, in many respects, only gradually "developed itself into anything like a satisfactory and settled "form. The full liberty of public writers to comment on the "conduct and motives of public men has only in very recent times "been recognised. Comments on government, on ministers and "officers of state, on members of both houses of parliament, on "judges and other public functionaries, are now made every day, "which half a century ago would have been the subject of actions "or ex officio informations, and would have brought down fine "and imprisonment on publishers and authors. Yet who can "doubt that the public are gainers by the change, and that, "though injustice may often be done, and though public men "may often have to smart under the keen sense of wrong inflicted "by hostile criticism, the nation profits by public opinion being "thus freely brought to bear on the discharge of public duties? "Again, the recognition of the right to publish the proceedings "of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought "necessary even for the publication of the decisions of the courts "upon points of law. Even in quite recent days judges, in "holding publication of the proceedings of courts of justice "lawful, have thought it necessary to distinguish what are called "ex parte proceedings as a probable exception from the operation "of the rule. Yet ex parte proceedings before magistrates, and "even before this court, as, for instance, on applications for "criminal informations, are published every day, but such a thing "as an action or indictment founded on a report of such an ex "parte proceeding is unheard of, and, if any such action or "indictment should be brought, it would probably be held that "the true criterion of the privilege is, not whether the report was "or was not ex parte, but whether it was a fair and honest report "of what had taken place, published simply with a view to the "information of the public, and innocent of all intention to do "injury to the reputation of the party affected." In *Allbutt* v. *General Council of Medical Education and Registration*,[29] there is a sentence to the same effect saying: "The court must adapt "the law to the necessary condition of society, and must from "time to time apply, as best it can, what it thinks is the good "sense of rules which exist to cases which have not been positively decided to come within them."

An example was suggested in argument. Suppose that in some American shipping case there had been, or was alleged to have been, wilful default of the master and crew in failing to make the ship seaworthy, and consequently a question of great difficulty and commercial importance arose under some clause of the charterparty, and suppose that the action eventually went on appeal to the Supreme Court of the United States, and they gave judgment on it. If English newspapers reported the judgment of the Supreme Court of the United States to the benefit of the English shipping and commercial community, would they be liable in damages to the master and crew for the incidental defamation? The answer should be "No." If it is in the public interest that some foreign judicial proceeding should be reported in the English newspapers, they ought to have qualified privilege for reporting it. Could there be a plea of "fair information on a matter of public "interest" which would be co-ordinate with the familiar plea of "fair comment on a matter of public interest?" The need for something on these lines arises because, if the defendant has published a statement "A says that B is dishonest," the defendant, in order to succeed on a plea of justification, has to prove that B is dishonest and not merely that A said so. A report of a judicial proceeding may contain many defamatory remarks by one party or witness about another party or witness. Privilege is required if there is to be any effective protection of a newspaper publishing reports of judicial proceedings when such reports are of public interest. In my view, there not only ought to be, but there is such privilege.

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[29] (1889) 23 Q.B.D. 400, 410.

There are three cases which afford some guidance. First there is *Cox* v. *Feeney*.[30] The headnote says: "In an action for "libel, consisting of a publication in a newspaper of a report of "an inspector of charities under the Charitable Trusts Act, containing a letter, written some years before, reflecting on the "plaintiff in his management of a college: *Held*, that as the "matter was one of public interest, the defendant was not liable, "provided he published it fairly, from an honest desire to afford "the public information, and that comments on it were only "material as evidence of malice."

Cockburn C.J. said[31]: "Information, though old, may be "valuable. And if the publication was with a view to give the "public information on a subject of public interest it would be a "ground of defence. It will be for the jury whether that was the "object or motive; but as to that it is very material that it is

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[30] (1863) 4 F. & F. 13.

[31] Ibid. 15.

"admitted the letter was part of the report, and that it was not "singled out for publication, but that the *whole* of the report "was published." In summing up to the jury he said that[32] "the publication was prima facie libellous, and it would be for "them to say whether, under the circumstances, it was privi-"leged. They would have to say, first, whether this was a matter "which it interested the public to know; and, secondly, whether "the defendant published it with the honest desire to afford the "public information. If they answered both those questions in "the affirmative, they should find a verdict for the defendant; if "otherwise, for the plaintiff." Then he went on to deal at length with the question whether the affairs of the institution concerned were matters of public interest.

Secondly, there is *Allbutt* v. *General Council of Medical Education and Registration*.[33] The headnote says: "By the "Medical Act . . . the General Council of Medical Education and "Registration were established, one of their duties being to keep "a register of medical practitioners. By section 29, 'if any "'registered medical practitioner shall after due inquiry be judged "'by the general council to have been guilty of infamous conduct "'in any professional respect, the general council may, if they "'see fit, direct the registrar to erase the name of such medical "'practitioner from the register.' *Held*, that if the council, "acting bona fide and after due inquiry, have adjudged a medical "practitioner to have been guilty of infamous conduct in a "professional respect, the court has no jurisdiction to review "their decision. . . . *Held*, also, that the publication of the "minutes of the council, containing a report of their proceedings, "comprising a statement that the name of a specified medical "practitioner has been removed from the register on the ground "that, in the opinion of the council, he has been guilty of in-"famous conduct in a professional respect, is, if the report be "accurate, and published bona fide and without malice, privi-"leged, and the medical practitioner cannot maintain an action of "libel against the council in respect of the publication." There is a passage in which Lopes L.J., delivering the judgment of the Court of Appeal, said[34]: "The council are not a private associa-"tion. They are a public corporation, invested with large powers "and privileges and charged with important duties—duties in "which not only the profession, but the public at large, are

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[32] 4 F. & F. 13, 19.

[33] 23 Q.B.D. 400.

[34] 23 Q.B.D. 400, 408.

"interested." Then he goes on to explain why that is so, and then he said, in particular[35]: "There is no appeal from their "decision, and the influence of public opinion is no small safe- "guard against the abuse of the powers entrusted to them. This "influence cannot be exercised if they keep secret the grounds on "which they act. The public are clearly interested in knowing "these grounds." Later he said[36]: "It would be stating the "rule too broadly, in our opinion, if it was held, that, to justify "the publication of proceedings such as these, the proceedings "must be directly judicial, or had in a court of justice. We can "find the law nowhere so broadly stated, nor do we think that in "these days it would be so laid down. The court must adapt "the law to the necessary condition of society, and must from "time to time apply, as best it can, what it thinks is the good "sense of rules which exist to cases which have not been posi- "tively decided to come within them." That last sentence is the one which I have already read for a slightly different purpose.

Then thirdly there is *Perera* v. *Peiris*.[37] I will read part of the headnote: "The respondents, the proprietor and the "printer of the 'Ceylon Daily News,' on various dates "in May, 1943, published in the newspaper a number of "extracts from the Official Report of the Bribery Commission— "a commission set up under statutory powers by the Governor of "Ceylon in August, 1941, to inquire into questions relating to "allegations that gratifications had been paid to certain members "of the then existing State Council of Ceylon for the purpose of "influencing their judgment and conduct in transactions in which "they, as members of the Council, were concerned. The report "was issued by the Government of Ceylon as a Sessional Paper "and was on sale to the public, copies being sent free to all "newspapers in Ceylon. Among the extracts from the Sessional "Paper, which were published in the 'Ceylon Daily News' without "any comment and, as found by the courts below, without any "malice express or implied was"—a particular comment on the plaintiff in the action. Now the headnote states, and I think correctly: "*Held*, applying the wide general principle which "underlies the defence of privilege in all its aspects—that the "requirements of public interest are served by publication—that "the immunity afforded by privilege attached to the publication "by the respondents of the report considered as a whole. In "considering whether reports of proceedings of bodies which are

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[35] 23 Q.B.D. 400, 409.

[36] Ibid. 410.

[37] [1949] A.C. 1; 64 T.L.R. 590.

"not judicial or parliamentary are privileged the status of those "bodies taken alone is not conclusive to establish that the public "interest is forwarded by publication, and it is necessary to "consider the subject-matter dealt with in the particular report. "If it appears that it is to the public interest that it should be "published privilege will attach. If malice in the publication is "not present and the public interest is served by the publication, "the publication of the report must be taken for the purposes of "Roman-Dutch law as being in truth directed to serving that "interest, and animus injuriandi, which is an essential element "in proceedings for defamation in that law, is negatived. In the "present case the due administration of the affairs of Ceylon "required that the report in light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of "legislation should receive the widest publicity."

The language of the headnote is to a large extent taken verbatim from the report of the Judicial Committee.[38]

Mr. Roche has argued that in such cases there has to be both appropriate status and appropriate subject-matter to confer privilege on the publication. He pointed out that in each of those three cases the report was made under statutory powers, and he said that was the relevant status in those cases.

If one accepts that Mr. Roche is right in saying that there must be appropriate status for the report, there is in the present case and its class of cases the ready-made status of a fair and accurate report of foreign judicial proceedings, and there is no need to look further for a status.

There is, however, undoubtedly the need for an appropriate subject-matter which must be of interest to the public concerned, in this case the English newspaper-reading public. Mr. Roche has pointed out that the word "interest" is of several meanings, and the relevant meaning for the present purpose has to be ascertained. He cited *Rex* v. *Rule*.[39] The headnote is: "The "appellant wrote to the Member of Parliament for his constituency two letters containing defamatory statements about a "police officer and a justice of the peace for the place where he "resided. He was charged with publishing defamatory libels and "pleaded that the libels were published on a privileged occasion. "The trial judge ruled that the occasion was not privileged and "the appellant was convicted. *Held*, by the Court of Criminal "Appeal, that a Member to whom a written communication is

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[38] [1949] A.C. 1, 21.

[39] [1937] 2 K.B. 375; 53 T.L.R. 720; [1937] 2 All E.R. 772, C.C.A.

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Pearson J.

" addressed by one of his constituents asking for his assistance in " bringing to the notice of the appropriate Minister a complaint " of improper conduct on the part of some public official acting " in that constituency in relation to his office, has sufficient " interest in the subject-matter of the complaint to render the " occasion of such a publication a privileged occasion, and that " in the absence of evidence of malice on the part of the appellant " the conviction could not stand." The judgment of the Court of Criminal Appeal was read by Lord Hewart C.J. He said[40] that, on a certain assumption, the case would fall " within the legal " canon adopted by the Court of Queen's Bench in *Harrison* v. " *Bush*[41]: ' A communication made bona fide upon any subject- " ' matter in which the party communicating has an interest, or " ' in reference to which he has a duty, is privileged, if made to a " ' person having a corresponding interest or duty, although it " ' contain criminatory matter which, without this privilege, would " ' be slanderous and actionable.' " Then he said[42]: " The mean- " ing of the word ' interest ' in this context is stated in a passage " in the late Fraser J.'s book on the Law of Libel and Slander, " where the learned author summarizes the effect of many deci- " sions: ' This common interest may be in respect of very varied " ' and different matters, indeed, the only limitation appears to " ' be that it should be something legitimate and proper, some- " ' thing which the courts will take cognizance of, and not merely " ' an interest which is due to idle curiosity or a desire for " ' gossip.' "

One has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip. There is not necessarily anything wrong in newspapers publishing news items which appeal only to idle curiosity or the desire for gossip. But, if they do so, there is not in the subject-matter any such legitimate and proper interest as is needed to confer privilege for an incidental defamation that may be involved.

There is thus a test available for deciding whether the subject-matter is appropriate for conferring privilege. A report of the decision of the United States Supreme Court on an important question of commercial law has legitimate and proper interest. On the other hand, a report of a judicial proceeding wholly concerned with an alleged scandalous affair between Mrs. X and

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[40] [1937] 2 K.B. 375, 379.

[41] (1855) 5 E. & B. 344, 348.

[42] [1937] 2 K.B. 375, 380–381.

Mr. Y is unlikely to have such interest and is likely to appeal only to idle curiosity or a desire for gossip.

Sometimes a report of foreign judicial proceedings will have intrinsic world-wide importance, so that a reasonable man in any civilised country, wishing to be well-informed, will be glad to read it, and would think he ought to read it if he has the time available. Sometimes a report of foreign judicial proceedings will not have such intrinsic world-wide importance, but will have special connection with English affairs, so that it will have a legitimate and proper interest for English readers, and the reasonable man in England will wish to read it or hear about it. For instance, a report of foreign judicial proceedings may throw light upon, or be related to or connected with, the administration of justice in England.

That is the present case. The report in "The Times" of September 25, 1959, of the judicial proceedings in the Swiss court is much connected with the administration of justice in England. Not only does it show a British subject being prosecuted in the Swiss court; it purports to show that in the proceedings in the Swiss court he confessed to having committed both the murder of Setty, of which he had been found not guilty in previous English proceedings, and also the serious recent offences in England for which he was wanted by the English police. As the administration of justice in England is a matter of legitimate and proper interest to English newspaper readers, so also is this report, which has so much connection with the administration of justice in England. In general, therefore, this report is privileged.

There is, however, one point remaining. The sentence of the report mainly complained of by the plaintiff is the sentence: "Asked if he was married and had a child Hume replied 'Yes, "'but it was not mine. The father was Stanley Setty.'" If that had no bearing on the confession, it might be said to be an extraneous matter, not germane to the matters of public interest and not covered by the privilege. But the confession was, as stated in the report: "He also admitted killing Stanley Setty, "a car dealer, out of jealousy." The statement that Stanley Setty was the father of the child was the explanation of the jealousy. It may not have been a true explanation, and the motive may not have been as stated, but that was the explanation given of the stated motive. In my view, it was not extraneous, but germane to the matters of public interest and covered by the privilege.

Accordingly, my determination of the point of law is that paragraph 6 of the defence discloses a defence in law.

Costs of this issue to be costs in the cause.
Leave to appeal granted.

Solicitors: *M. A. Jacobs & Sons; Charles Russell & Co.*

M. M. H.

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